Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ROBERT G. TILTON,

*Petitioner,*

v.

CAPITAL CITIES/ABC INC.;
AMERICAN BROADCASTING COMPANIES, INC.;
ABC NEWS, INC.; DIANE SAWYER; ROBBIE GORDON;
and KELLY SUTHERLAND

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

# PETITION FOR A WRIT OF CERTIORARI

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November 25, 1996

34 pp

## QUESTIONS PRESENTED FOR REVIEW

I. Is a Plaintiff's Seventh Amendment right to a jury trial violated by a Court's granting of summary judgment, in favor of a moving party Defendant, after having drawn all reasonable inferences in light most favorable to the moving party Defendant?

II. If libel Plaintiff proves statements and implications in broadcast concerning him are false, is he then entitled to an injunction preventing the rebroadcast of the those same statements and implications, regardless of whether they were uttered with knowledge of their falsity in the first instance?

## LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here, appear in the caption of the case, except for the Walt Disney Company, which is now the parent of Capital Cities/ABC.

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# PETITION FOR A WRIT OF CERTIORARI

## REFERENCES TO OFFICIAL AND UNOFFICIAL OPINIONS

Judgment and Order of the District Court for the Northern District of Oklahoma, 6-19-95

Opinion of the United States Court of Appeals for the Tenth Circuit, 8-27-96

## STATEMENT OF GROUNDS OF JURISDICTION

1. The Court of Appeals entered its Judgment on August 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

2. Jurisdiction in the United States Supreme Court is based upon the following:

a. Rule 10(a) and (c), of the Rules of the Supreme Court of the United States. Pastor Tilton requests review of a final decision of the United States Court of Appeals for the Tenth Circuit, which is in conflict with the United States Constitution, decisions of other United States courts of appeals and this Court on the same matter, and which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of the common law.

28 U.S.C. Fed. R. Civ. P. Rule 56(c)

> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## STATEMENT OF THE CASE

On November 21, 1991, Defendants broadcast, to a national audience, their television program "*PrimeTime* Live", the primary subject of that program being Plaintiff/Appellant Robert Tilton. The program proceeded to paint an entirely unflattering portrait of Pastor Tilton, to the extent that it explicitly and implicitly accused Pastor Tilton of being a fraud, committing mail fraud, lying and otherwise being callous, insensitive and indifferent to the needs and wants of his, at that time, extensive congregation. The broadcast leveled the following libelous accusations against Pastor Tilton, none of which were true: that Holy Water Pastor Tilton was mailing out to his followers, claiming it was from the River Jordan in Israel, was instead obtained from Taiwan; that Pastor Tilton was soliciting money for an orphanage in Haiti that he claimed to be his own, when actually there was no orphanage, and that the solicitation was part of

a money laundering scheme; that Pastor Tilton's ministry was, overall, just a scam to generate personal wealth, and that the scam was an idea that had been hatched with friends early in Pastor Tilton's college days; that Pastor Tilton was associated with a convicted criminal, Herman Beebe, and that by such association Pastor Tilton was engaged in organized crime and drug smuggling; that Pastor Tilton made specific promises to his followers to pray over their mailed-in prayer requests, but that he actually just had donations removed from such mail and had the followers' requests thrown in the trash. None of these accusations of fraud and criminal activity was true in any conceivable way. Pastor Tilton sent to Defendants a transcript with exhibits of a hearing in federal court in Austin, Texas, from the case *Word of Faith World Outreach Ctr. v. Morales*, 787 F.Supp. 689 (W.D. Tex. 1992), *rev'd*, 986 F.2d 962 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 82 (1993), wherein three of the above accusations were proven to be false, specifically, the issues of Holy Water, the Haitian orphanage and prayer requests being thrown in the trash.

Despite having been provided information, given under oath, proving that the accusations contained in the first broadcast were false, Defendants proceeded to re-broadcast their program regarding Pastor Tilton on July 9, 1992, with those and additional falsehoods leveled at Pastor Tilton. In addition to the original accusations of fraud and criminal activity, Defendants included the following concerning Pastor Tilton, none of which was true: that Pastor Tilton admitted under oath that he was a liar, done by creatively editing a videotape deposition of Pastor Tilton, excising a random "no" answer by Pastor Tilton in his testimony, and using that clip as an answer to an ABC announcer's voice-over, saying, "Eight months later, are his followers getting the full story?"; that Pastor Tilton claimed to fully support a mission in Guatemala, and did not; that Pastor Tilton claimed to have been invited to the president's inauguration in

Guatemala, and was not; that Pastor Tilton conducted a crusade in India, telling his followers that they had financed that crusade, when actually he took collections in India nightly, collecting "hundreds of thousands of dollars." Again, none of the accusations leveled by Defendants against Plaintiff was, in any way, true.

On November 11, 1992, Plaintiff commenced his diversity libel and false light invasion of privacy action against Defendants, alleging the above-described accusations by Defendants libeled Plaintiff and/or cast Plaintiff in a false light in the public eye. On July 26, 1994, Plaintiff filed his Final Amended Complaint, consolidating all of his claims against Defendants, including an equitable action for injunctive relief. After extensive discovery by both parties, both parties filed motions for summary judgment and respective responses to the motions for summary judgment. On June 19, 1995, the District Court, Burrage, J., entered its judgment in favor of Defendants, Capital Cities/ABC, Inc., ABC News, Inc., American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland, and against the Plaintiff, Robert G. Tilton, on all issues. The district court's order, as to the libel claims, purported that, after an examination of the facts, Pastor Tilton had not proven actual malice as to some claims and falsity as to others. As to Plaintiff's claim for injunctive relief, the court based its dismissal solely on the ground that Plaintiff had not met any prerequisites for a prior restraint action. On August 27, 1996, the United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment for substantially the same reasons as the district court.

Jurisdiction in the United States District Court for the Northern District of Oklahoma was based on 28 U.S.C. § 1332.

## ARGUMENT

### I.

**The District Court's Granting of Summary Judgment Against Plaintiff by Drawing all Reasonable Inferences in Favor of Moving Party Defendant Denies Plaintiff His Seventh Amendment Right to a Jury Trial.**

This Court, in reversing a granting of summary judgment in *Sartor v. Arkansas Nat. Gas Corp.*, 321 U.S. 620, 627 (1943), made the following observation regarding the use of summary judgment:

> The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of a trial by jury if they really have issues to try.

The district court's order in this case, and the circuit court's blanket sanction of that order, strikes off in a direction that is contrary to the holding of this Court in *Sartor*, and furthermore, is contrary to the holdings of this Court regarding rulings on summary judgment motions in libel cases. As this Court held in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255, 106 S.Ct. 2505 (1986), and reiterated in *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2434 (1991):

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and

> the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255.

There is no inconsistency between the holding in *Sartor* and that of *Anderson* and *Masson*. If there are issues in dispute, then the litigants have a Seventh Amendment constitutional right to try them to a jury. The district court is simply not allowed to weigh the evidence and resolve the factual disputes before it. In fact, it is constitutionally prohibited from doing so. As the Tenth Circuit recognized in *Frey v. Frankel*, 361 F.2d 437 (10th Cir. 1966), yet failed to acknowledge here:

> In considering a motion for summary judgment, the court is required to examine the record in the light most favorable to the party opposing the motion ... Under Rule 56, "no margin exists for the disposition of factual issues, and it does not serve as a substitute for a trial of the case nor require the parties to dispose of litigation through the use of affidavits ... The foregoing requirements are to be strictly applied to insure that genuine factual issues will not be determined without the benefit of a trial. *Frey*, 361 F.2d at 442 (citations omitted).

Distilling the matter even further, in *Farbwerke Hoeschst A.G. v. M/V "Don Nicky"*, 589 F.2d 795 (5th Cir. 1979), the Fifth Circuit has bluntly stated:

> The district court's function, in a summary judgment proceeding, is not to resolve factual issues but to determine whether there exists a genuine issue

> of material fact. F.R.Civ.P.56(c). In making its determination, the court may not weigh conflicting affidavits to resolve disputed fact issues. *Id.* at 798.

In this case, the district court's decision amounts to nothing more than a ruling after a trial on the affidavits. Credibility determinations, weighing of the evidence, and certainly all reasonable inferences were, contrary to the law, drawn by the district court in favor of the moving party Defendant. The district court did not limit itself to a determination of the existence of disputed facts, it weighed the clearly disputed facts before it and unconstitutionally resolved them in favor of the moving party Defendants. The trial court thus denied Plaintiff his Seventh Amendment right to try the factual disputes of his case to a jury.

This case does not concern a news broadcast where ABC reported what had happened or what someone said. It concerns a story that was created, fabricated if you will, by ABC to make money. It is one lie upon another. It's a story that was created by fraudulent editing and this fact is proven by ABC's own raw footage. This is a story which was built to a punch line; that the preacher had a bank take the money from the mail and throw the prayer requests in the trash, mail fraud. ABC took that punch line to every branch of the state and federal government and tried to get Pastor Tilton prosecuted for the mail fraud that they had created. The undisputed facts conclusively establish that Defendants planted the prayer requests in the bank dumpster in order to frame Pastor Tilton and to create a story to make money. It is axiomatic when you broadcast a lie which you have created, that you have knowledge of the falsity of the lie. It is axiomatic that when the evidence proves that you have fraudulently edited tapes to create that which was broadcast, which never happened, that you have knowledge of the falsity of that broadcast. It is axiomatic that when you plant evidence to frame a

person of a crime and broadcast that evidence, then you have knowledge of the falsity of that broadcast.

This case boils down to issues revolving around inferences and implications made by the Defendants against Pastor Tilton. Pastor Tilton asserts that Defendants' broadcasts made rather obvious implications that Pastor Tilton was a fraud and engaged in fraudulent conduct. Pastor Tilton also asserts that documentary evidence of Defendants' statements and conduct prior to the first broadcast prove that Defendants not only knew of the implications they were making, but that they intended for the public to understand those implications. The Defendants' blanket response was that they never made any *statement* in the broadcasts that Pastor Tilton was a fraud, *i.e.*, did not use the word "fraud". This miscarriage of justice, therefore, has its Genesis. The district court partially recognized the instruction of this Court in *Masson*, that "it is 'the substance, the gist or the sting' of the alleged defamatory statements that are critical to the Court's analysis." (District Court 6/19/95 Order, p.5) The reason for the district court's failure to properly rule on the motions makes itself apparent here. It is not "defamatory statements" that are the issue, but rather defamatory implications within the statements of the Defendants. Certainly this Court must have contemplated this, as is demonstrated by this Court's statement from *Masson*:

> Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced."

*Masson*, 111 S.Ct. at 2433. If taken in their full context, what may or may not have been implied by the broadcasts, or what effect the statements of the Defendants may have had on the minds of their audience and that of a jury, was never reached by the district court. Defendants argued in support of their motion for summary judgment that they never explicitly stated that Pastor Tilton was a fraud or that

he was engaged in fraudulent conduct. The district court, contrary to the law, repeatedly took Defendants at their word, as is exemplified by the following analysis from the district court's June 19, 1995 Order concerning the complained of Holy Water segment:

> Defendants, in response and in support of their motion, contend that the challenged segments did not state that the holy water came from Taiwan nor did they accuse Plaintiff of mail fraud. Rather, the broadcasts stated that some of the other items mailed to Plaintiff's followers came from Taiwan. Defendants also state that the gist of their segments was substantially true. ...
>
> Upon review of the record related to the challenged segments, the Court finds that Plaintiff has failed to show that he is entitled to judgment as a matter of law and has failed to raise a genuine issue of fact in response to Defendants' summary judgment motion as to the element of actual malice. The challenged segments did not, as Plaintiff argues, state that holy water came from Taiwan nor did they explicitly accuse Plaintiff of mail fraud. Even though Plaintiff contends that the broadcasts imply such facts, Plaintiff has failed to produce adequate evidence to establish that Defendants intended or knew that the broadcasts implied such facts.

(District Court 6/19/95 Order, pp.17,18).

This is after the district court had fully discussed Pastor Tilton's submission on the issue, which, as is shown, completely disputes Defendants' version of the facts:

> Plaintiff also states that ABC's raw footage of the discussion between Ms. Gordon, Ole Anthony and Jeff Cooke following the interview clearly demonstrates that Defendants recognized they lacked any evidence to support their statement in the broadcasts. Specifically, Plaintiff points to Ms. Gordon's statements that she would like to know where they "get the--that Lord's water and a couple of other things;" that she didn't "feel like we've got him nailed right now;" and that she "really wanted to get him to say that stuff is not from the River Jordan." ... Plaintiff also states that ABC's notes clearly show what ABC wanted to say in the broadcasts as they state that "Tilton's miracle waters and oils, cloths, etc. - most come from Taiwan - though they imply they are from the Holy Land or somehow anointed." ... Furthermore, Plaintiff argues that Defendants knew that their accusation Plaintiff misrepresented Taiwanese water as River Jordan water was an accusation Plaintiff committed mail fraud as Defendant, Diane Sawyer, specifically asked John Brugger of the United States Postal Service in an interview if "the stuff they send out, the, the holy water ... in fact, it comes from Taiwan. If they don't actually say where it comes from, again you can't-- ... It has to be fairly specific?"

(District Court 6/19/95 Order, pp.16-17). That the district court is going out of its way to accept the facts in a light most favorable to the moving party Defendants could not be more obvious. The district court acknowledges that Pastor Tilton is asserting that the challenged segment *implies* that Pastor Tilton is sending out Holy Water, claiming it is from the River Jordan, when it is actually from

Taiwan. The district court reasons, however, that there can be no accusation of such a mail fraud because the segment did not *state* or *explicitly accuse* Pastor Tilton of such conduct, on no basis whatsoever other than that Defendants, in support of their motion, make that assertion. Pastor Tilton presented facts in his motion, and in his response, to support his position that the segment implied such a libel. The best example of this is a host of articles from various newspapers covering the scandal and letters from former followers that leave no doubt that the implication of mail fraud was loud and clear. On Wednesday, November 27, 1996, a week after the first broadcast, the Dallas Morning News reported:

> The ABC program suggested that Mr. Tilton is not sending money to an orphanage in Haiti, as he claims, *and that vials of "holy water," which Mr. Tilton said come from Israel, he buys from Taiwan instead.* (emphasis added)

Pastor Tilton also presented evidence in the form of purchase orders, receipts and cancelled checks from the church in Israel from which the water was purchased, that the implication was false. Such was the evidence presented by Pastor Tilton in response to Defendants' motion for summary judgment, not just concerning the allegation surrounding "Holy Water", but all of the allegations. Pastor Tilton was, as a matter of law, entitled to have all the inferences drawn from that evidence in a light most favorable to him. This was not done. If the district court had properly drawn all reasonable inferences in favor of Pastor Tilton, it could not have found that the broadcast could not have implied such frauds and that the accusations were false. Obviously, some reasonable minds are at odds with Defendants' spin on events, and Pastor Tilton has a constitutional right to prove his case to a jury, a right he has thus far been denied. It is respectfully submitted that Pastor Tilton's brief to the Tenth Circuit included an appendix that consisted of eight volumes, 2243

pages in length, which included 174 exhibits providing uncontroverted factual support of Pastor Tilton's position. That submission proved, with hard documentary evidence, the existence of numerous disputed facts which were before the district court and which were not even addressed in the Tenth Circuit's truncated opinion, stating that the trial court was substantially correct and ordered the district court's order be published. When dealing with a person's constitutional right to a trial by jury, the standard must be that the trial court was one hundred percent correct, and that there was not one single disputed fact to present to the jury. Considering the volume of factual information Pastor Tilton provided to both courts in support of his action, such a conclusion by the district court and the Tenth Circuit is not sustainable.

**II.**

**The District Court's Order Failed to Properly Address Plaintiff's Cause of Action for an Injunction of Judicially-Proven False Speech.**

The district court disposed of Pastor Tilton's cause of action for injunctive relief with no more discussion than was included in a footnote. Relying on *Schmoldt v. Oakley*, 390 P.2d 882 (S.Ct. Okla. 1964), the district court concluded that Pastor Tilton had not raised any of the "exceptions to the general rule that equity will not restrain libel or slander." The absence of any meaningful discussion by the district court of its reason for granting judgment in favor of Defendants on this issue, and its reliance on *Schmoldt*, indicate a lack of understanding on behalf of the district court of the equitable relief Pastor Tilton was seeking. *Schmoldt* was a prior restraint case, and apparently the district court viewed, once again through the prism of the Defendants' point of view, this cause of action as one of prior restraint. This cause of action, as Pastor Tilton has repeatedly asserted, is not one of prior restraint, but rather is purely one of post-publication restraint of speech, proven false in a court of law.

The rules that the district court rely upon, therefore, do not apply to this action.

This Court has held open the door to the possibilities of post-publication restraint of proven false speech. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572 (1941), this Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. ... These include the lewd and obscene, the profane, the libelous ... . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (footnotes omitted)

*Id.* at 571-72. False speech enjoys no protection under the Constitution. This Court reinforced the holding of *Chaplinsky* with the following language from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974):

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.

Obviously, the existence, or lack thereof, of actual malice is not an essential element in an attack upon libelous speech by its victim.

Indeed, falsity alone has been viewed as enough reason to sustain an injunction over adjudicated libelous speech. While knowledge of falsity, or reckless disregard thereof, is necessary to *punish* a media speaker for his action, proof of falsity is all that is

necessary to enjoin false speech. Once an alleged falsehood is found to be false in a court of law, that proof of falsity is all that is required to support prevention of a re-utterance of that falsehood by injunctive relief. In keeping with this Court's long and unbroken precedent that false speech has absolutely no constitutional value, this Court held in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 390 (1973) as follows:

> While the Court boldly stepped beyond this narrow doctrine in *Near v. Minnesota* ... in striking down an injunction against further publication of a newspaper found to be a public nuisance, *it has never held that all injunctions are impermissible. See Lorain Journal Co. v. United States*. ... The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, *before an adequate determination that it is unprotected by the First Amendment.* (citations omitted) (emphasis added).

The plain meaning of this Court's language certainly was not lost on the Third Circuit. The Third Circuit, in *Kramer v. Thompson*, 947 F.2d 666, 675-676 (3rd Cir. 1991), stated:

> The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected ... Because libelous speech is not protected by either the United States or the Pennsylvania Constitutions, ... it follows that, once a jury has determined that a certain statement is libelous, it is not a prior restraint

> for the court to enjoin the defendant from repeating that statement. *Id.*

Pastor Tilton's cause of action for a permanent injunction is not one seeking prior restraint. Pastor Tilton seeks only to prove to a jury that statements and implications regarding him, broadcast to the nation not once, but twice, were and are false, and to obtain an injunction to prevent Defendants from ever rebroadcasting those exact statements and implications, when they have been adjudicated to be false. As discussed, the district court improperly resolved factual disputes as to falsity and intent in this action in favor of moving party Defendants. The proof of falsity on many issues was overwhelming, the district court chose to ignore the issue of falsity as to some of those statements, stating:

> As to other claims, the Court finds Plaintiff cannot establish the element of actual malice, and therefore, falsity need not be addressed.

(District Court 6/19/95 Order, p.5). Indeed, if the district court had not misunderstood Pastor Tilton's equitable cause of action, and the law supporting such a cause of action, it would have recognized that falsity *had to be addressed*. Plaintiff was, and is, entitled to try the issue of falsity to a jury and if the jury finds those statements to be false, those false statements can be enjoined from further publication.

## CONCLUSION

This Court should grant *certiorari* to restore Pastor Tilton's Seventh Amendment right to a jury trial, which right has been denied to Pastor Tilton by the district court's improper use of summary judgment, and its misunderstanding and misapplication of prior restraint to Pastor Tilton's claim for injunctive relief. This Court should exercise its power to re-educate both the district court and the court of appeals on the law of the First and Seventh Amendments to the Constitution as it applies to this case. The district court and the

court of appeals must be reminded that all citizens of this nation have the constitutional right to a jury trial on fact issues, and that this Court has mandated that it is not a court's function to usurp a jury's fact-finding power on summary judgment. The district court and the court of appeals must be reminded that this Court has found that speech may be enjoined if adjudicated false. On these issues Pastor Tilton is entitled to reversal and his right to a trial. For this, the writ should be granted.

Respectfully submitted,

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# APPENDIX

No. 92-C-1032-BU

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

ROBERT G. TILTON, an individual,

Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; et al.,

Defendants.

**FILED**
**MAY 26 1995**
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

## ORDER

Motion for Summary Judgment of Defendants, American Broadcasting Companies, Inc., Diane Sawyer, Robbie Gordon, and Kelly Sutherland, (Docket Entry #244) is GRANTED and Motion for Partial Summary Judgment of Plaintiff, Robert G. Tilton, is DENIED (Docket Entry #257). A written order setting forth the Court's reasons for its decision along with a judgment shall be filed within 15 days from the date of this Order. The pretrial conference scheduled for June 2, 1995 at 9:00 a.m. and the jury trial scheduled for June 19, 1995 at 9:30 a.m. are STRICKEN.

ENTERED this 26th day of May, 1995.

/s/ Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

No. 92-C-1032-BU

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON, an individual,

Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; et al.,

Defendants.

FILED
JUN 19 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUN 20 1995

## JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment (Docket Entry #243) filed by Defendants, Capital Cities/ABC, Inc. and ABC News, Inc., the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland and the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton and the issues having duly considered and decisions having duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Capital Cities/ABC, Inc., ABC News, Inc., American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland, against

Plaintiff, Robert G. Tilton, and that Defendants shall recover of Plaintiff their costs of action.

DATED at Tulsa, Oklahoma, this 19th day of June, 1995.

/s/ Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

No. 92-C-1032-BU

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

ROBERT G. TILTON, an individual,

Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; et al.,

Defendants.

FILED
JUN 19 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

## ORDER

On May 26, 1995, the Court entered an Order granting the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland and denying the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton. The following sets forth the Court's reasons for its decision.

On November 21, 1991, Defendant, American Broadcasting Companies, Inc. ("ABC"), broadcast on its weekly television news show PrimeTime Live, a program entitled "Men of God" which focused on -- and was critical of -- three televangelists, W.V. Grant, Larry Lea and Plaintiff, Robert G. Tilton. On July 9, 1992, ABC rebroadcast its original PrimeTime Live program, with some revisions and clarifications, and broadcast a follow-up segment reporting on additional information ABC had learned about Plaintiff

after its original broadcast.[1] Defendant, Diane Sawyer, was the anchor and correspondent for both of the broadcasts. Defendant, Robbie Gordon, and Defendant, Kelly Sutherland, were the producer and associate producer, respectively, for the specific reports concerning Plaintiff which were entitled "The Apple of God's Eye."

On November 11, 1992, Plaintiff commenced this diversity libel and false light invasion of privacy action against Defendants,[2] alleging that PrimeTime I and PrimeTime II broadcast three libelous and false light statements. Plaintiff, on May 13, 1993, moved the Court for entry of a temporary restraining order and a preliminary injunction barring ABC from rebroadcasting statements contained in the PrimeTime Live broadcasts. After a five-day evidentiary hearing, the Court denied Plaintiff's request for injunctive relief finding, inter alia, that Plaintiff had failed to demonstrate there was a substantial likelihood of recovery on the merits of his claims. Thereafter, Plaintiff amended his complaint setting forth additional allegations of libelous and false light statements made by Defendants in PrimeTime I and PrimeTime II. At the Court's directive, Plaintiff, on July 26, 1994, filed his Final Amended Complaint, which consolidated all of his claims against Defendants.[3] After

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[1]The November 21, 1991 and the July 9, 1992 broadcasts shall be hereinafter referred to as PrimeTime I and PrimeTime II respectively.

[2]Plaintiff also named Capital Cities/ABC, Inc. and ABC News, Inc. as Defendants. On May 24, 1995, the Court granted Capital Cities/ABC, Inc. and ABC News, Inc.'s summary judgment motion.

[3]In addition to his libel and false light invasion of privacy claims, Plaintiff alleged an "equitable claim for permanent injunction" seeking to permanently enjoin the rebroadcast of any portions of the PrimeTime Live broadcasts. In light of the Court's findings in this Order and the absence of any facts which brings Plaintiff's claim within one of the exceptions to the general rule that equity will not restrain libel or slander, see, Schmoldt v. Oakley, 390 P.2d 882, 886 (Okla. 1964), the Court finds that Defendants are entitled to summary judgment as to Plaintiff's claim.

conducting extensive discovery, Plaintiff has now filed his partial summary judgment motion, seeking judgment as to six segments of the broadcasts which allegedly contain libelous and false light statements. Defendants have also filed a summary judgment motion, seeking judgment as to all alleged libelous and false light statements.

The parties agree that Plaintiff is a public figure. Thus, in order to prevail on his claims, Plaintiff must establish that the alleged defamatory statements are false and that Defendants acted with actual malice in publishing the alleged defamatory statements.[4] Philadelphia Newspapers v. Hepps, 475 U.S. 767, 775-78, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). In order to prove actual malice, Plaintiff must show that Defendants acted with "knowledge that [the publication] was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 280. A reckless disregard for the truth requires more than a departure from reasonably prudent conduct. Harte-Hanks, 491 U.S. at 688. There must be sufficient evidence to support a conclusion that Defendants made the false publication with a "high degree of awareness of . . . probable falsity," Garrison v.

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[4]As stated, Plaintiff has alleged both libel and false light invasion of privacy claims. Similar to libel, the tort of false light invasion of privacy requires proof that the challenged statements were false and that they were made with actual malice. See, Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983); Colbert v. World Publishing Co., 747 P.2d 286, 291 (Okla. 1987). Accordingly, the discussion in this order concerning the falsity and actual malice elements applies to both the libel and false light claims.

Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), or that Defendants "entertained serious doubts as to the truth of [their publications]." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The actual malice standard may be proven by indirect or circumstantial evidence. Herbert v. Lando, 441 U.S. 153, 170, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). However, because First Amendment concerns are implicated, Plaintiff must prove actual malice with convincing clarity. New York Times, 376 U.S. at 285-286.

As stated, Plaintiff must also establish falsity of the alleged defamatory statements in order to prevail on his claims. Hepps, 475 U.S. at 776-78; Garrison, 379 U.S. at 74. In so doing, Plaintiff cannot simply point to minor inaccuracies in the challenged statements. Rather, he must show that the statements were not substantially true. As stated by the Supreme Court in Masson v. New Yorker Magazine, 501 U.S. 496, 516-517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), it is "the substance, the gist or the sting" of the alleged defamatory statements that are critical to the Court's analysis.

Unlike the element of actual malice, the Supreme Court has not addressed the appropriate standard of proof for falsity. Harte-Hanks, 491 U.S. at 661, n. 2. The circuit courts, which have addressed the issue, have reached different conclusions. Compare Firestone v. Time, Inc., 460 F.2d 712, 722-723 (5th Cir.) (Bell, J., specially concurring), cert. denied, 409 U.S. 875 (1972) and Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977) (expressing view that clear and convincing standard applies to issue of falsity) with Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) and Rattray v. City of National City, 36 F.3d 1480, 1487 (9th Cir. 1994) (expressing view that preponderance of the evidence standard applies). However, in reaching its determination of the parties' motions, the Court need not make a definitive ruling in regard to the

appropriate standard of proof. As will be discussed hereinafter, the Court finds Plaintiff's proof of falsity is inadequate even under the lesser standard of the preponderance of evidence in regard to several of his claims. As to other claims, the Court finds Plaintiff cannot establish the element of actual malice, and therefore, falsity need not be addressed.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, the Court must draw all reasonable inferences from the record in favor of the party opposing summary judgment. Brueggemeyer v. American Broadcasting Cos., 684 F.Supp. 452, 454 (N.D. Tex. 1988). When the non-moving party bears the burden of proof at trial, summary judgment is warranted if the non-moving party fails to "make a showing sufficient to establish the existence of an essential element of that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether a material factual dispute exists for trial, the Court views the evidence through a prism of the controlling legal standard. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, in regard to the issue of actual malice,

> "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

Id. at 255-56.

Applying the foregoing standards, the Court now examines the alleged libelous and false light statements in PrimeTime I and PrimeTime II.

**Haitian Orphanage**

PrimeTime I reported:

"SAWYER: [voice-over] And what about this mission, Tilton's orphanage in Haiti? We kept thinking about Bob Jones and how he told us you could just fix yourself up a sign and claim an orphanage.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER: [voice-over] Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no.

[interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No."

PrimeTime II also reported:

"SAWYER: [voice-over] And what about this mission, Tilton's orphanage in Haiti? Well, remember Bob Jones who told us for just a few thousand a month we could put up a sign and claim an entire orphanage, even if we weren't the only contributor.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER:[voice-over] So even though his magazine calls it the Robert Tilton Ministries

Children's Home, it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage.

[interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No."

In his motion and in response to Defendants' motion, Plaintiff contends that the underlined statements in the above-quoted segments of the PrimeTime Live broadcasts were false and were published by Defendants with actual malice. Plaintiff argues that the broadcasts falsely accused him of mail fraud by stating that he claimed to own and/or to provide financial support to a Haitian orphanage, when he did not. Plaintiff contends that neither he nor Word of Faith World Outreach Center Church ("Church") ever claimed to own an orphanage in Haiti and Defendants have never possessed any documents which shows that he or the Church ever made such a statement. Plaintiff contends that the Church did sponsor an orphanage in Haiti, World Harvest Orphanage, which was owned by Reverend Lee and Chris Sullivan. Plaintiff asserts that in 1985, Plaintiff, on behalf of the Church, sent one letter appealing for funds for the Haitian orphanage. Since 1985, however, neither he nor the Church has solicited funds for the Haitian orphanage. Plaintiff further asserts that he did not use three names to describe the Haitian orphanage as stated in PrimeTime I. Plaintiff concedes that the three names, including "Robert Tilton Ministries Children's Home," were used in his ministry magazine; however, he maintains the copy for the magazine articles, wherein the three names were referenced, was written by Reverend Lee Sullivan.

In regard to Defendants' statements as to Bob Jones, Plaintiff contends such statements tied Plaintiff's support of a Haitian orphanage to the "money laundering scheme" of Mr. Jones which

was described in the segment of televangelist, W.V. Grant.[5] Plaintiff contends that neither he nor the Church were in any way affiliated with Mr. Jones. Moreover, Plaintiff asserts that neither he nor his Church ever sent Mr. Jones money or conducted any business with him. Plaintiff contends that Ole Anthony, a Dallas minister, furnished Mr. Jones' name to Defendants and testified in the Word of Faith World Outreach Center Church, Inc. v. Morales case[6] that Mr. Jones had no connection with Plaintiff. Although Defendants were given a copy of Mr. Anthony's testimony prior to the PrimeTime II broadcast, Plaintiff states that they ignored the testimony and rebroadcast the statements implicating Plaintiff in Mr. Jones' scheme.

In addition, Plaintiff argues that Defendants knew, prior to the broadcast of PrimeTime I, that only a few orphanages were registered with the Haitian government. Plaintiff specifically cites to Defendant, Kelly Sutherland's notes of an interview with Fritz Artistyl in Haiti, which included the statement, "149 registered. 700 working w/o legal status," and her notes on the back of a photograph picturing World Harvest Orphanage, which included the statement, "did a survey found 700 additionally on Haitian soil--only 148 registered." (Joyce Aff., Ex. 42, Ex. 43). Plaintiff also argues that Ms. Sutherland knew, prior to the broadcast, that Plaintiff did in fact sponsor an orphanage in Haiti as she knew the name of the orphanage and the names and addresses of the Sullivans, who owned the orphanage. Plaintiff asserts that Defendants, Diane Sawyer and

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[5]According to Plaintiff, the broadcasts explained that Mr. Jones ran a money laundering scheme whereby W.V. Grant would claim Mr. Jones' orphanage and send money to Mr. Jones for the orphanage and then Mr. Jones would return a kickback to him from the money received.

[6]Word of Faith World Outreach Center Church, Inc. v. Morales, 787 F. Supp. 689 (W.D. Tex. 1992), rev'd 986 F.2d 962 (5th Cir. 1993).

Robbie Gordon, also knew, prior to the broadcast, that Plaintiff supported an orphanage in Haiti. Plaintiff states that Ms. Gordon's knowledge is shown by a memo sent to Ira Rosen, senior producer for PrimeTime Live, on July 23, 1991, stating that she did not expect to find out that Plaintiff's missions were nonexistent. (Joyce Aff. Ex. 38). Although Defendants had knowledge that Plaintiff sponsored an orphanage in Haiti, Plaintiff argues that Defendants knowingly broadcast the PrimeTime I segment claiming that they could not find any orphanage. Plaintiff further argues that despite the information obtained prior to PrimeTime I and the evidence obtained from Plaintiff after PrimeTime I aired, Defendants knowingly rebroadcast similar false statements in PrimeTime II.

Defendants, in response to Plaintiff's motion and in support of their motion, contend that even if Plaintiff's statements that he never "owned" an orphanage in Haiti; that he did contribute money to World Harvest orphanage; that after 1986, he did not solicit funds for World Harvest Orphanage; and that he never associated with or knew Bob Jones were true, the broadcasts at issue did not report any such facts. Defendants contend that the broadcasts never said Plaintiff owned an orphanage. Indeed, Defendants state that PrimeTime II specifically stated "even though his ministry magazine calls it the Robert Tilton Ministries Children's Home, it's not really Tilton's place at all." Defendants assert PrimeTime I stated that they could not find any of the three orphanages identified in Plaintiff's ministry magazine and other promotional materials and PrimeTime II stated that they could not find "Robert Tilton Ministries Children's Home." Defendants contend that they accurately reported in PrimeTime I that they could not find any of the three named orphanages. According to Defendants, the evidence shows that they conducted an exhaustive investigation to find the orphanages, including World Harvest Orphanage, but could not locate any of them. Defendants argue that they accurately reported that the Haitian

officials had neither heard of Plaintiff nor any of the orphanages identified in Plaintiff's magazine and other promotional materials. Defendants also argue that they accurately reported in PrimeTime II that the Haitian officials had neither heard of Plaintiff nor Robert Tilton Ministries Children's Home. Although Plaintiff claims that he did not write the copy for the magazine articles which identified the three orphanages, Defendants contend that he was the publisher of the magazine.

As to Bob Jones, Defendants contend they never stated that Plaintiff was associated with or knew Mr. Jones. They contend the broadcasts stated that the canvas sign on the Haitian orphanage featured in Plaintiff's magazine brought to mind the statements of Mr. Jones. Defendants maintain Plaintiff cannot present any evidence to show that the canvas sign did not bring those statements to mind. In addition, Defendants state that Plaintiff cannot and has not disputed the accuracy of the quote attributed to Mr. Jones that just for a few thousand dollars a month "you could just fix up a sign and claim an orphanage" in Haiti. Defendants further state that the quote is accurate as to Plaintiff since the canvas sign on the Haitian orphanage featured in his magazine was hung only once and for the explicit purpose of photographing it.

Having reviewed the challenged segment of the broadcasts and the evidence applicable thereto, the Court finds Plaintiff has failed to establish that he is entitled to judgment as a matter of law in regard to the segments. The Court also finds that Plaintiff has failed to present sufficient evidence, even under a preponderance of the evidence standard, to raise a genuine issue of fact as to the falsity of the segments so as to defeat Defendants' motion. In addition, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether Defendants knew of the alleged falsity of the segments or entertained serious doubts as to their truth.

Despite Plaintiff's assertions to the contrary, the broadcasts at issue did not state that Plaintiff owned a Haitian orphanage nor did they report that Plaintiff did not provide any support to an orphanage in Haiti. PrimeTime I stated that the Haitian officials had not heard of any of the three orphanages identified in Plaintiff's magazine[7] and PrimeTime II stated that even though the Plaintiff's magazine called the mission, Robert Tilton Ministries Children's Home, it was not his place at all and Haitian officials had not heard of Plaintiff or his orphanage. Plaintiff has alleged that since Defendants knew the name of the orphanage sponsored by Plaintiff's Church and the individuals who ran it, Defendants could have and should have located the orphanage. However, it is undisputed that Defendants, prior to the broadcast of PrimeTime I, did attempt to locate World Harvest Orphanage and specifically questioned Haitian officials about that orphanage. The evidence also reveals that even though Defendants had the names and addresses of the Sullivans, they were unable to locate them in both Haiti and Dallas. Although Plaintiff may contend that Defendants were negligent in failing to find the orphanage, such claim does not support a finding of actual malice. Masson, 501 U.S. at 509 (mere negligence does not suffice to prove actual malice).[8] As to PrimeTime II, Defendants merely reported

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[7]Although Plaintiff argues that he did not "use" three names for the orphanage he sponsored as he did not write the copy for magazine articles, the undisputed evidence shows that Plaintiff was the publisher for the magazine. Consequently, the Court opines that no reasonable juror would conclude that Plaintiff was not responsible for the use of the three names to describe the orphanage in Haiti.

[8]Plaintiff contends that Defendants purposefully avoided the truth when Jeff Cooke failed to ask about the location of the Haiti orphanage or the names of its pastors during a job interview with Mike Groves. While purposeful avoidance of the truth may suffice to prove actual malice, see, Harte-Hanks, 491 U.S. at 692, the videotape submitted to support that contention does not show Mr. Cooke's interview with Mike Groves. Notwithstanding, the Court finds that Mr. Cooke's failure to ask the location of the Haiti orphanage does not in and of itself demonstrate an avoidance of the truth. Moreover, Plaintiff has failed to show that Mike Groves

that Robert Tilton Ministries Children's Home identified in Plaintiff's magazine was not his orphanage and Haitian officials had not heard of him or the orphanage. Plaintiff has failed to present any evidence to show that such report was false or that it was made with knowledge of the falsity or with serious doubts as to its truth.[9]

Likewise, the Court finds that the broadcasts did not state that Plaintiff knew or was associated with Bob Jones. PrimeTime I stated that "[w]e kept thinking about Bob Jones and how he told us you could just fix yourself up a sign" and PrimeTime II stated "[w]ell, remember Bob Jones who told us for just a few thousand a month we could put a sign and claim an entire orphanage, even if we weren't the only contributor." Defendant, Robbie Gordon, has testified that the canvas sign on the Haitian orphanage which was featured in Plaintiff's magazine and was shown on the broadcasts brought to mind the statements of Mr. Jones. Plaintiff has failed to present sufficient evidence to show that the canvas sign did not bring Mr. Jones to mind to Defendants.[10]

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would have been privy to that information and would have disclosed that information to Mr. Cooke during his job interview.

[9]In attempting to demonstrate actual malice with respect to PrimeTime II, Plaintiff argues that prior to the broadcast of PrimeTime II, his attorney provided Defendants with information evidencing Plaintiff's contributions to an orphanage in Haiti. However, as stated, PrimeTime II did not say that Plaintiff provided no support to an Haitian orphanage. Instead, it reported "[s]o even though his magazine calls it the Robert Tilton Ministries Children's Home, it's not really Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage."

[10]In his briefs, Plaintiff contends that Ms. Gordon and Ms. Sutherland showed Mr. Jones the picture of the canvas sign featured in the Church's magazine and led him to make the statement about the sign. Nevertheless, Plaintiff does not dispute that Mr. Jones made the statement to Defendants. Nor does he present any affirmative evidence to establish that the picture of the canvas sign did not bring Mr. Jones' statement to mind.

Plaintiff has alleged that Defendants falsely accused Plaintiff of mail fraud in the broadcasts. Plaintiff, however, has failed to present sufficient evidence to demonstrate an intent or awareness on the part of Defendants that they implicitly accused him of such conduct. See, Newton v. National Broadcasting Co., 930 F.2d 662, 681 (9th Cir. 1990) (not permissible to uphold jury verdict on basis that "because the broadcast may be capable of supporting the impression [plaintiff] claims, [defendant] must therefore have intended to convey the defamatory impression at issue"); Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1319 (7th Cir. 1988) (to show actual malice, plaintiff must prove "with clear and convincing evidence that the defendants intended or knew of the defamatory implications"); Woods v. Evansville Press Co., 791 F.2d 480, 487 (7th Cir. 1986) (actual malice not shown where "there is no evidence that the defendants . . . shared the plaintiff's interpretation of [article] or intended that the [article] be read to contain the defamatory innuendos the plaintiff attributes to it").

**Holy Water - Response Media**

PrimeTime I and PrimeTime II reported the following:

"SAWYER: [voice-over] Tilton sends out an avalanche of things he asks viewers to sent back to him -- 'miracle prayer cloths' he promises to touch and place upon an altar, cords he says he'll place on a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing -- place your hand there and he'll put his hand there too. There's holy water from the River Jordan, 'miracle anointing oil' -- though Moore said some of the items come from that holy place Taiwan."

MR. MOORE: We get stuff from Taiwan."

Plaintiff, in support of his motion and in response to Defendants' motion, contends that the statements in these segments

of PrimeTime I and PrimeTime II were false in that they accused Plaintiff of mail fraud by stating that he sends to his followers holy water from Taiwan rather than from the River Jordan as represented. Plaintiff contends that the evidence clearly shows that the holy water sent to his followers came from the River Jordan. He also contends that ABC's raw footage from the interview with Jim Moore shows that he never said any of Plaintiff's mailing items came from Taiwan. According to Plaintiff, Mr. Moore's statement "[w]e get stuff from Taiwan" had nothing to do with Plaintiff's mailings items. Plaintiff states that Mr. Moore was obviously distracted when he answered the question posed by Defendant, Robbie Gordon. Plaintiff also states that ABC's raw footage of the discussion between Ms. Gordon, Ole Anthony and Jeff Cooke following the interview clearly demonstrates that Defendants recognized they lacked any evidence to support their statement in the broadcasts. Specifically, Plaintiff points to Ms. Gordon's statements that she would like to know where they "get the--that Lord's water and a couple of other things;" that she didn't "feel like we've got him nailed right now;" and that she "really wanted to get him to say that stuff is not from the River Jordan." (Joyce Aff., Ex. 18 at pp. 71, 110, 112). Plaintiff also states that ABC's notes clearly show what ABC wanted to say in the broadcasts as they state that "Tilton's miracle waters and oils, cloths, etc. - most come from Taiwan - though they imply they are from the Holy Land or somehow anointed" and "[t]he miracle waters, oils, replicas of widow's mites, etc. -- many come from Taiwan, though they imply they are from the Holy Land or they are somehow anointed." (Joyce Aff., Ex. 19, Ex. 20). Plaintiff further contends that Defendants knew that their statement about the holy water was false because prior to the rebroadcast on PrimeTime II, Plaintiff advised Defendants that the allegations regarding the holy water were false and enclosed evidence to prove that the holy water came from the River Jordan. Furthermore, Plaintiff argues that Defendants knew

that their accusation Plaintiff misrepresented Taiwanese water as River Jordan water was an accusation Plaintiff committed mail fraud as Defendant, Diane Sawyer, specifically asked John Brugger of the United States Postal Service in an interview if "the stuff they send out, the, the holy water . . . in fact, it comes from Taiwan. If they don't actually say where it comes from, again you can't-- . . . It has to be fairly specific? (Joyce Aff., Ex. 21 at p. 15, Ex. VT-21).

Defendants, in response and in support of their motion, contend that the challenged segments did not state that the holy water came from Taiwan nor did they accuse Plaintiff of mail fraud. Rather, the broadcasts stated that some of the other items mailed to Plaintiff's followers came from Taiwan. Defendants also state that the gist of their segments was substantially true. According to Defendants, the gist of the challenged segments was that Plaintiff obtained inexpensive items for his mailings. Defendants state that discovery has confirmed the gist as some of Plaintiff's mailing items came from Hong Kong. In addition, Defendants argue that Plaintiff cannot show actual malice with respect to the broadcasts as Ms. Gordon has testified she believed that Response Media obtained some of Plaintiff's mailing items from Taiwan. Defendants stated that Mr. Moore also testified that it was possible for Ms. Gordon to have interpreted his comments to mean the mailings came from Taiwan. In regard to ABC's notes referred to by Plaintiff, which were sent to Ms. Sawyer by Ms. Gordon before Ms. Sawyer's interview with Mr. Brugger and which contained comments that "many" or "most" of Plaintiff's "miracle waters and oils, cloths, etc." came from Taiwan "though they imply they are from the Holy Land or they are somehow anointed," Defendants contend that the notes do not support a finding of actual malice. Defendants argue that if they "wanted to say" that "many" or "most" of the mailing items came from Taiwan in the broadcasts, they could have. Likewise, if they wanted to accuse Plaintiff of mail fraud, they could have.

Defendants, however, state that neither broadcast contained such statements.

Upon review of the record related to the challenged segments, the Court finds that Plaintiff has failed to show that he is entitled to judgment as a matter of law and has failed to raise a genuine issue of fact in response to Defendants' summary judgment motion as to the element of actual malice. The challenged segments did not, as Plaintiff argues, state that holy water came from Taiwan nor did they explicitly accuse Plaintiff of mail fraud. Even though Plaintiff contends that the broadcasts imply such facts, Plaintiff has failed to produce adequate evidence to establish that Defendants intended or knew that the broadcasts implied such facts. See, Saenz, 841 F.2d at 1318. Plaintiff has presented evidence to show that none of the items obtained for his mailings came from Taiwan. However, Plaintiff has not presented sufficient evidence to establish that Defendants knew that their statement "though Moore said some items come from that holy place Taiwan" was false or that they subjectively entertained serious doubts as to its truth. Plaintiff cites to Defendant, Robbie Gordon's remarks "I would like to know, just out of curiosity, where they get the -- that Lord's water and a couple of other things;" "I really wanted to get him to say that stuff is not from the River Jordan, but I think he. . ." and "I don't think we have him nailed right now" to support his allegations of actual malice. These remarks, however, do not establish that Defendant did not believe that some of the items for Plaintiff's mailing came from Taiwan. Indeed, it is apparent from the transcript of the interview with Mr. Moore that Ms. Gordon's "nailed" remark was not directed at the holy water or other mailed items as argued by Plaintiff.[11] As

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[11]In his briefs, Plaintiff argues that Ms. Gordon could not have believed that Mr. Moore was referring to Plaintiff's mailing items when he said "[w]e get stuff from Taiwan." Plaintiff states that Mr. Moore, Mr. Anthony, Ms. Gordon and Mr. Cooke had left the room where the display of the Church's button mailing was

there is an absence of clear and convincing evidence of Defendants' subjective awareness of alleged falsity, the Court concludes that Plaintiff's attack on the challenged segments must fail.

PrimeTime I and PrimeTime II also reported:

"SAWYER: [voice-over] So we decided to take hidden cameras to see what we could learn about Robert Tilton's fund-raising. It led us first to the nerve center of his ministry, the company that organizes his direct mail. It's called Response Media.

JIM MOORE: Bob is doing far better than anyone knows.

SAWYER: [voice-over] Jim Moore is president of Response Media. He handles not only Tilton, but a number of big corporate accounts. We told Moore that we were media consultants for this man, Dallas minister Ole Anthony. We asked him to show us how to start a big money ministry like Tilton's.

MR. MOORE: Give them something for free. You know, we want to mail you the latest copy of "X", and get their name and address. New names is the key, new names. Just think, 'New names.'

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located and Ms. Gordon, when asking her question to Mr. Moore, was pointing to the far wall of the room they were in at the time. Plaintiff states that it is clear that Mr. Moore was distracted when the question was asked. However, the Court finds that such facts do not establish that Ms. Gordon did not understand Mr. Moore to be referring to Plaintiff's mailing items. The transcript of the interview reveals the parties had been looking at wall displays of fund-raising activities, one of which included a button mailing of Plaintiff's Church. Ms. Gordon's question to Mr. Moore referenced buttons.

SAWYER: [voice-over] We learned that once people give you their names, its easy to keep them on the hook. You mail them something with a gimmick in it.

MR. MOORE: First of all, when you send an item in it, it gets their attention. That's number one.

* * * *

SAWYER: [voice-over] The letters accompanying the items are written by ghost writers to pressure followers to write back and make donations, too. Does it work? People send them in by the truckloads. It's a great marketing scheme.

* * * *

SAWYER: [voice-over] And when the letters arrive, they're processed so the company knows which fund-raising appeals you can use to squeeze followers for the most donations.

Mr. MOORE: We take the clients' files and we run them up against demographic information and create a profile of who their people are, how many people have cars that are new--

SAWYER: [voice-over] So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar opportunities."

In their motion, Defendants contend that Plaintiff cannot prevail on his challenges of these segments of the broadcasts concerning Defendants, description of Response Media as the "nerve center" or "the company who organizes his direct mail" and their

statements that "the letters accompanying the items are written by ghost writers to pressure followers to write back and make donations, too. It's a great marketing scheme." Defendants contend that even though Plaintiff argues that Response Media was "only a printer" for him and that "[Internal Data Management] handled the mail" for him, Mr. Moore, during his interview, described Response Media's role far more than that of "only a printer." According to Defendants, Mr. Moore described to Mr. Anthony, Ms. Gordon and Mr. Cooke, a wide range of services Response Media could provide to a ministry and indicated that he performed such services for Plaintiff. The described services included sophisticated direct mail strategies, market research techniques and statistical analyses. He also explained the process of handling the direct mail. In addition, with respect to Plaintiff's ministry, Defendants contend that Mr. Moore portrayed himself as responsible for Plaintiff's success, claiming that Plaintiff "was out of business" prior to his association with Response Media. According to Defendants, Mr. Moore told his interviewees that he commuted to Dallas every day for two years, and in reference to assistance he provided to Plaintiff in reorganizing his ministry, Mr. Moore stated that he "worked with them." Mr. Moore further indicated that Response Media did the media buying for Plaintiff's Church. In light of these representations, Defendants contend they believed that Response Media was the "nerve center" of Plaintiff's Church and the "company that organizes his direct mail."

Defendants also contend that discovery has confirmed Response Media served Plaintiff's ministry as more than a printer. Defendants state that the evidence shows Response Media acted as a consultant to the Church with respect to its mailings. Mr. Moore participated in meetings at which mailing strategies and results were discussed and analyzed. In addition, Response Media created a demographic study for Plaintiff's Church.

Even if Response Media were "only a printer" and Internal Data Management handled the direct mail operation for Plaintiff, Defendants contend that the gist or substance of the challenged segments was substantially true. According to Defendants, the gist of the broadcasts was that Plaintiff utilized a sophisticated direct mail operation which effectively brought in large amounts of contributions. Defendants argue that there is no dispute that such was the case, whether the direct mail operation was conducted by Response Media or Internal Data Management.

As to the statement in the broadcasts that Plaintiff's letters were written by ghost writers, Defendants state that such statement was true. Defendants contend that Kathryn Ingley, the Church's manager of partner correspondence, described herself as a ghost writer for Plaintiff. Defendants also assert that Plaintiff testified that he had the concept in the letter but that it was the responsibility of Internal Data Management employees as subordinates to put the letter in mailable form. Defendants further argue the evidence reveals the employees of Internal Data Management reviewed the prayer partners' letters, selected the responses to them and then mailed them out over Plaintiff's signature.

In response to Defendants' motion, Plaintiff disputes that Response Media was the nerve center. He also disputes the accuracy of Defendants' characterization of Mr. Moore's statements during the interview. While Plaintiff concedes Mr. Moore indicated that Response Media could perform a wide range of services, he contends that Mr. Moore did not state he performed such services for Plaintiff. Additionally, Plaintiff disputes the accuracy of Defendants' statement that Mr. Moore claimed credit for Plaintiff's financial success. Plaintiff states that Mr. Moore never made such a statement and in fact, the evidence shows that he was not responsible for the success. Plaintiff further asserts that Mr. Moore did not claim to do the media buying for Plaintiff. Rather, he stated that the "downtown

office" did the media buying, referring to J.C. Joyce's office. Plaintiff further denies Defendants' contention that Mr. Moore was a consultant for Plaintiff. Plaintiff states that Mr. Moore was only a technical advisor involved in the layout and design of the mailing. Furthermore, Plaintiff states that Mr. Moore has only performed one profile of the Church's mailing and the Church did not use the information.

The Court, upon review of the challenged segments of the broadcasts and the record thereof, finds that Plaintiff has failed to satisfy his burden to overcome summary judgment as to the issue of actual malice in regard to Defendants, description of Response Media as the "nerve center" and as "the company that organizes his direct mail." Plaintiff has failed to provide affirmative evidence to demonstrate that Defendants knew their statements were false.[12] The transcript of the interview with Mr. Moore reveals that Mr. Moore did indicate or at least suggest that he performed a wide variety of services for Plaintiff. Moreover, Mr. Moore told Ms. Gordon, Mr. Anthony and Mr. Cooke that he had commuted to Dallas for two years to work with Plaintiff's ministry and that he had been the one responsible for moving direct mailing services from in-house to Tulsa. The transcript, contrary to Plaintiff's contention, also shows that Mr. Moore did in fact take credit for Plaintiff's success. Indeed, in the interview, Mr. Moore stated:

> "[w]hen I got associated with Bob he was about out of business . . . .
>
> * * * *

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[12]In any event, the Court finds Defendants' characterization of Response Media as the "nerve center" is non-actionable as it is an opinion which is not susceptible to proof of its truth or falsity. See, e.g., Metcalf v. KFOR-TV, 828 F.Supp. 1515, 1529-32 (W.D. Okla. 1992).

> He was having a very difficult time. In fact, almost--I don't know if he knew what to do at the time. When he first came on, the first mailing program that we did with him he, he tried to convince me--he went--he wanted to go with this real slick--. . . .
>
> * * * *
>
> And what he felt would work and what would actually work were two different things. And once he saw that this wouldn't work, he was willing to go with this . . .
>
> * * * *
>
> Bob, is, is doing far better than anyone knows.

(Joyce Aff., Ex. 18 at pp. 91-92).

These statements clearly demonstrate that Mr. Moore claimed credit for Plaintiff's success. Furthermore, in regard to Mr. Moore's statement as to media buying, the Court concludes that the statement, at the very least, is ambiguous and in the Court's view, could be understood by Defendants as indicating that Mr. Moore and Response Media played a part in media buying.[13] As to

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[13]The transcript of the interview reads:

> "Jim Moore: He's [referring to Plaintiff], He's on more stations, more market--I, I don't think anyone's on as many stations as he is or as many times.
>
> Ole Anthony: Are--now, do-- now, do you do the time buying for that kind of stuff?
>
> Jim Moore: No, and Bob--we--a friend of mine--see, I used to do all the media buying at, at Oral's when I was there. And a friend of mine that used to work there, I had him do the media buying for him initially to get him started. Then we are doing it here in Tulsa, but out of the downtown office."

demographic analysis, Plaintiff has not submitted specific facts to show that Defendants knew that the statements in regard to Response Media's participation in such activity was false or that they subjectively entertained serious doubts that their statements were false.

In regard to Defendants' statement concerning ghost writers, the Court finds that Plaintiff has failed to present sufficient evidence, even under a preponderance of the evidence standard, to establish that the statement was false. Moreover, the Court finds that Plaintiff has not shown with convincing clarity that Defendants knew such statement was false or had serious doubts as to its truth. The undisputed evidence shows that Kathryn Ingley and others wrote letters for Plaintiff and that Ms. Ingley considered herself as a ghostwriter. It is also undisputed that Internal Data Management employees reviewed letters from prayer partners, selected responses to those letters and then sent them out over Plaintiff's signature. Even though Plaintiff claims that the broadcast implies that the employees of Response Media were ghostwriters for the letters, the Court concludes that the gist of Defendants' statement is substantially true as Kathryn Ingley as well as Internal Data Management employees wrote letters or selected responses on behalf of Plaintiff.[14]

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(Joyce Aff., Ex. 18 at p. 92).

[14]The Court also notes that Plaintiff challenges statements made in the follow-up segment of PrimeTime II with respect to the drafting of mailings. The statements were attributed to Marie Tilton from a deposition. In that deposition, Ms. Tilton acknowledged that the handwriting on personal letters to Plaintiff's followers was not Plaintiff's handwriting. She also admitted that letters sent to Plaintiff's Church by individuals seeking spiritual guidance were answered by individuals hired by the data processing center in Tulsa. In this action, Ms. Tilton has attested to the accuracy of those comments and Plaintiff has not presented evidence to the contrary. Therefore, Plaintiff's attack to those statements fail.

As to remainder of the challenged statement involving ghost writers and the statements concerning letters sent and received from followers, the Court finds that Plaintiff cannot satisfy his burden of proof that Defendants made the statements with knowledge of falsity or doubts as to their truth. As to Defendants' statements "[i]t's a great marketing scheme" and "So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar opportunities," the Court finds that such statements are non-actionable as statements of opinion, not verifiable as true or false. See, Metcalf v. KFOR-TV, 828 F.Supp. 1515, 1529 (W.D. Okla. 1992) ("statements which are opinionative and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel"); Miskovsky v. Oklahoma Pub. Co., 654 P.2d 587, 593 (Okla. 1982) (opinion or "judgmental statement in which the maker of the same expresses his views" cannot be libelous).[15]

**Prayer Requests**

PrimeTime I and PrimeTime II reported:

"SAWYER: [voice-over] But how much does Tilton really care about the beat-up and the hurting? We kept thinking about something the head of the direct mail operation told us, that the mail doesn't go to Tilton. It's forwarded unopened to Tilton's bank in Tulsa. So the bank opens the followers, mail, not to share the agony, but to get the money.

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[15]In his Final Amended Complaint, Plaintiff challenges the statements made in PrimeTime I and PrimeTime II attributed to "Tilton's marketing director" that "when it comes to money, Tilton is very smart. He's careful not to say what donation goes where so he can avoid, again, how Jim and Tammy got caught." Upon review of the record, the Court finds that Plaintiff cannot show by clear and convincing evidence that Defendants knew the alleged falsity of the statements or entertained serious doubts as to their truth.

> INTERVIEWER: The bank opens the letters that come back in?
>
> MR. MOORE: Right. And takes your money and puts it in your account. All we get is the paper document and how much the person gave.
>
> SAWYER: [voice-over] And those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them too? If some make it to Tilton, there are thousands that didn't. We found them in the garbage at the bank and the marketing research center. The 'angels of god,' the prayer cords, the arrows -- this person wanted his aimed at getting a real dad -- the tracing where Tilton said he'd place his hand, ripped up by [PrimeTime I: the bank] [PrimeTime II: letter processors]. We found heart-breaking appeals from followers and letters like this one. It came with personal photographs for Pastor Bob and a prayerful message. It also came with a seven thousand dollar pledge. The money probably made it to Tilton. The prayers went in the trash."

Plaintiff, in support of his motion and in response to Defendants' motion, contends that the above-quoted segments are false. Plaintiff contends that Response Media did not receive any prayer requests from the bank as stated by the broadcasts. Plaintiff asserts that his mail processor, Internal Data Management, received all the prayer requests. Moreover, Plaintiff contends that Mr. Moore never told Ms. Gordon, Mr. Anthony and Mr. Cooke, during their interview, that he received "the paper document [or] how much the person gave" in regard to Plaintiff's mail. Nor did Mr. Moore state that "mail doesn't go to Tilton." Plaintiff states that prayer requests were sent to him from Internal Data Management. In addition,

Plaintiff contends that the statement "[a]nd those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them, too" was false because the visual shown at the time the statement was made, does not show items prayed over and sent in by followers. Rather, the pictured mail was actually prayer request forms that Plaintiff's Church had sent to Defendant, Kelly Sutherland, at her request, but which had never completed and returned to the Church. Plaintiff also states that Defendants produced videotapes shot in Dallas with techniques to make the small quantity of the Church's mail they had "look voluminous." Plaintiff further contends Defendants' statements that "[i]f some make it to Tilton, there are thousands that didn't" and "we found them in the garbage at the bank and the marketing research center" were false. According to Plaintiff, Defendants never found any prayer requests in the garbage at the bank or the marketing center which had been placed there by employees. Nor could they find "thousands" of prayer requests. Plaintiff contends the evidence in the record establishes that no mail which was opened by Commercial Bank and Trust had any contents removed or thrown away and that no mail received by Internal Data Management was ever disposed of in its dumpster. Indeed, Plaintiff states that an employee of the janitorial service, who personally emptied the trash for Commercial Bank and Trust and Internal Data Management, wrote a letter to Defendant, Diane Sawyer, stating that no prayer requests were thrown away.

In addition, Plaintiff contends that Defendants acted with actual malice in publishing the false statements. In making the statements, Defendants relied upon Mr. Anthony, who purportedly found the trashed prayer requests. However, Plaintiff asserts that Defendant, Kelly Sutherland, was advised by Peggy Wehmeyer, now ABC's religious editor, that Mr. Anthony could not be trusted and was obsessed with his crusade against Plaintiff. Plaintiff states that Ms. Sutherland's testimony, as well as Ms. Gordon's testimony, that

they believed Mr. Anthony had found the prayer requests in the trash cannot be relied upon as their credibility is at issue. Plaintiff additionally states that Defendants acted with actual malice in rebroadcasting the statements on PrimeTime II because they were advised by Plaintiff, after PrimeTime I aired, the accusations were clearly false. Plaintiff specifically provided the trial transcript and exhibits of the Morales case to Defendants which showed that there were never thousands of prayer requests thrown in the trash.

Furthermore, Plaintiff alleges that Defendants acted with actual malice because the evidence reveals that Defendants or their agents stole prayer requests from Commercial Bank and Trust and Internal Data Management and stole handwritten letters referred to as "white mail" from the Church's sanctuary and planted 37 of the prayer requests in the trash to support their report. Plaintiff contends that Internal Data Management has the original envelopes which contained the prayer requests that Defendants claimed in the broadcasts were found in the trash dumpsters. These envelopes, Plaintiff argues, prove the prayer requests were stolen and then were placed back in the bank without the prayer requests and with only a token offering. Plaintiff argues that Defendants or their agents stole the envelopes. Plaintiff contends that Defendants filmed Mr. Anthony removing trash containing prayer requests behind the dumpsters at the Commercial Bank and Trust and took video and still pictures showing prayer requests at that location. Defendants also took video and still pictures at Internal Data Management. The video and still pictures, Plaintiff argues, were destroyed by Defendants.

Defendants, in response and in support of their motion for summary judgment, contend that Plaintiff cannot show with convincing clarity that Defendants acted with actual malice with respect to the broadcasts. Defendants contend that Ms. Gordon has testified that Mr. Anthony told her, after their interview with Mr. Moore, that he and two of his colleagues, Powell Holloway and

Harry Guetzlaff, intended to look through the trash outside Commercial Bank and Trust. Ms. Gordon and Ms. Sutherland have testified that Mr. Anthony had told them that he and his colleagues had examined the trash outside Commercial Bank and Trust, Internal Data Management and the law offices of J.C. Joyce, counsel for Plaintiff. Ms. Gordon also has testified that Mr. Anthony reported that he and his colleagues had discovered thousands of items of trash. Ms. Gordon and Ms. Sutherland further testified that on different occasions, they inspected trash which Mr. Anthony said he had found during his "trash trips" and that the believed Mr. Anthony accurately reported what he had found. Although Plaintiff contends that Ms. Sutherland had been advised that Mr. Anthony was not trustworthy and was obsessed with Plaintiff's crusade, Defendants contend that Plaintiff has shown nothing to rebut Defendant's testimony that she believed that Mr. Anthony had retrieved the prayer requests from the trash. Moreover, Defendants contend that the evidence Plaintiff has presented to challenge the credibility of Ms. Gordon and Ms. Sutherland has nothing to do with their belief that Mr. Anthony recovered prayer requests in the trash of the bank and the marketing research center. Furthermore, Defendants contend that Plaintiff has failed to present any evidence to support his accusations that Defendants stole prayer requests or planted stolen prayer requests in the trash dumpsters.

In addition to actual malice, Defendants contend that Plaintiff has failed to meet his burden of proof as to the issue of falsity. Despite Plaintiff's attacks on certain statements of the broadcasts, Defendants maintain that the gist or sting of the broadcasts was demonstrably true. According to Defendants, the gist of the reports was Plaintiff's preoccupation with money, a focus that led him to take the most stringent steps to assure that every penny he received from followers was deposited in the bank at the same time the prayers of those followers were treated with callous indifference.

Defendants contend that the evidence has in fact revealed that thousands -- hundreds of thousands -- of prayer requests mailed to Plaintiff were thrown away, pursuant to Plaintiff's directive, without being prayed over by him. Defendants state that at least 180,000 P-21B and P-21C prayer forms[16] of Plaintiff's followers were trashed and that tens of thousands of other responses to Plaintiff's mailings were, as well, trashed. Additionally, Defendants contend that tens of thousands of handwritten letters from followers were routinely discarded. Defendants acknowledge that Plaintiff did receive a computer printout with cryptic codes referencing the form letters that Internal Data Management employees sent back to the followers. However, Plaintiff never told his followers that he prayed over the computer printouts instead of the original prayer requests. Defendants contend that all of the undisputed evidence reveals that Plaintiff did not in fact personally pray over thousands of prayer requests that were mailed to him.

The Court, having carefully reviewed the evidence submitted, finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of fact as to whether Defendants acted with actual malice in regard to their reports. Plaintiff has failed to present sufficient evidence to show that Defendants knew or were aware the statements concerning Mr. Moore were false. Moreover, Plaintiff has failed to present any evidence to show that Defendants did not believe that the "mail doesn't go to Tilton." Plaintiff has additionally failed to sufficiently rebut the testimony of Ms. Gordon and Ms.

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[16]According to Defendants, Internal Data Management sent to individuals, who initially responded to Plaintiff's appearances on television, the "Prayer of Agreement Miracle Campaign" mailing or the "P-21" mailing. In the mailing, Plaintiff agreed to pray in agreement with the individuals for 21 days. The mailing contained three forms on which the individuals were asked to write prayers to Plaintiff for the 1st, 8th and 15th days. The "P-21B" and "P-21C" forms were for the 8th and 15th days.

Sutherland concerning Mr. Anthony's report of trashed prayer requests, their inspection of the prayer requests which Mr. Anthony stated were trashed and their belief that his report was accurate. Plaintiff claims that the credibility of Ms. Gordon and Ms. Sutherland is at issue and therefore their testimony cannot support summary judgment on the issue of actual malice. However, the evidence presented to attack the credibility of Ms. Gordon and Ms. Sutherland does not relate to Mr. Anthony, the trash trips conducted by Mr. Anthony or whether they believed Mr. Anthony retrieved the prayer requests from the trash. Moreover, the fact that Ms. Sutherland was advised that Mr. Anthony was not a credible source does not establish actual malice. Ms. Sutherland testified that in fact the majority of information Mr. Anthony provided to her in regard to Plaintiff and his Church was accurate. Plaintiff has not shown that such testimony is untrue or that Ms. Sutherland had reason to question the veracity of Mr. Anthony's report that he had found prayer requests in the trash.[17] Plaintiff also claims that the reports were false because the prayer requests were stolen and then planted in the trash dumpsters. Discovery, however, has failed to uncover any factual basis for the allegations that Defendants stole and planted the prayer requests in the trash dumpsters or in fact suspected that others stole and planted the prayer requests in the trash dumpsters. Plaintiff has no evidence to reasonably show that Defendants destroyed the still and video pictures claimed by Plaintiff. With an absence of affirmative evidence or specific facts to demonstrate that

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[17]As stated by the court in Brueggemeyer, the "First Amendment does not require that one who speaks on a public issue do so based only on inviable sources; instead the First Amendment inquires whether the sources are sufficiently perfidious to cause the publisher to believe the information is probably false or to prompt the publisher seriously to doubt the truth of what the source has revealed." 684 F.Supp. at 460. The Court concludes that a jury could not reasonably find, by clear and convincing evidence, that Defendants acted with actual malice in relying upon Mr. Anthony.

Defendants knew the alleged falsity of their statements in the challenged segments or entertained serious doubts as to those statements, the Court finds that Plaintiff's claim in regard to the statements cannot prevail.[18]

PrimeTime II also reported:

"ANNOUNCER: Eight months later, are his followers getting the full story?" (Followed by film clip of Plaintiff's videotape deposition in which he is shaking his head and saying "no.")

* * * *

> "SAWYER: [voice-over] But four months later, here is Tilton in a videotaped deposition with the Texas attorney general's office, which they recently released to the press over Tilton's objection. In it, Tilton admits he doesn't really pray over every prayer request at all.
>
> Rev. Tilton: [deposition] Not all of them are the original prayer request. Some are on a computer print-out with their specific kind of prayer that they want me to pray. So I don't get the actual document of some of them.

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[18]Plaintiff, in his briefs, also challenges Defendants' reliance upon the statements of Brenda Reynolds, Plaintiff's housekeeper and nanny, in her interview with Defendant, Diane Sawyer. Plaintiff contends that Defendants knew Ms. Reynolds' statement "I know for a fact that he did not pray over them" could not be true because Defendants knew she was not with Plaintiff enough hours of the day or days of the week to know. However, the Court finds that Plaintiff has failed to sufficiently show that Defendants had any reason to doubt Ms. Reynolds' credibility or the truthfulness of her statements. Defendants knew that Ms. Reynolds was Plaintiff's housekeeper and nanny. Moreover, Ms. Reynolds specifically told Defendants that Plaintiff told her to "just take [the prayer requests] to the trash" and "[t]hrow them away."

ATTORNEY: And what happens to the actual document?

Rev. Tilton: It's thrown away."

Plaintiff claims that the above-quoted statements in the PrimeTime II broadcasts were false and that Defendants acted with actual malice in publishing the statements. Upon review of the record, the Court finds an absence of evidence showing the statements were false. Indeed, the Court finds that the record supports the statements. The record reveals that Plaintiff admitted that he did not pray over all the prayer requests sent to him. Instead, he prayed over computer printouts with the requested prayer. The evidence also shows that Plaintiff did not tell his followers that he prayed over computer printouts. Even if there were evidence in the record to show falsity, the Court finds there is no evidence whatsoever to establish Defendants knew the alleged falsity of the statements or had serious doubts as to their truth.

Phone Ministers

PrimeTime I reported:

"SAWYER: [voice over] And if Hardy felt he was taking advantage of the callers, imagine how this woman felt, Elizabeth Montcalm, a temporary employee at AT&T. When Tilton went to Israel last year, she and others at AT&T were asked to pose as Tilton prayer ministers.

ELIZABETH MONTCALM: I got people calling about their sons being on drugs or alcoholics or husbands being an -- an alcoholic. I mean, people are telling you their most intimate secrets, their personal stuff about themselves. And here I am, you know, just a temporary employee from AT&T."

Defendants, in support of their motion, contend they are entitled to summary judgment as to Plaintiff's challenge of the underlined statement "she and others at AT&T were asked to pose as Tilton prayer ministers." Defendants assert that their description of AT&T employees posing as prayer ministers was demonstrably true. Defendants assert that when Plaintiff broadcast from Israel in September 1990, he urged viewers to phone in their prayer requests to "prayer ministers" standing by at a "miracle prayer center" in Dallas. According to Defendants, Plaintiff instructed the temporary AT&T workers, who had been retained to answer calls, to answer telephone calls by saying, "[t]hank you for calling Success N Life Ministry" and to tell "rambling" callers, "[y]our miracle will come as you pray with Pastor Bob the Prayer of Agreement." Ms. Montcalm, a temporary AT&T employee from Florida, told Defendants that when she was answering calls for Success N Life during the Israel crusade, callers told her intimate details of their lives, apparently believing that they were speaking to prayer ministers. From what was reported, Defendants contend that they believed their statement that AT&T temporary workers were asked to pose as prayer ministers was true.

In response, Plaintiff contends that the Ms. Montcalm and others at AT&T were never asked to pose as prayer ministers. Plaintiff states that the employees were simply hired to take overflow calls which came in during the Israel crusade. Plaintiff contends that the employees were instructed not to pray for anyone. Plaintiff further contends that during her interview, Ms. Montcalm never stated that she was asked to pose as a prayer minister.

Although Plaintiff has submitted evidence to support his contention that AT&T workers were not explicitly asked to pose as prayer ministers, the Court finds that Plaintiff has not submitted any evidence whatsoever to establish with convincing clarity that Defendants knew their statement in regard to the temporary AT&T

employees was false or that they entertained serious doubts of the truth of their statement. Defendants knew prior to the broadcast that Plaintiff told his viewers during the crusade that their calls were being answered by "prayer ministers" at a "miracle prayer center." They also knew that AT&T temporary employees were instructed by Plaintiff to open each call by stating "[t]hank you for calling Success N Life Ministry, how may I help you?"; to take the caller's name, address, phone number and prayer request; and to respond to some callers by saying "your miracle will come as you pray with Paster Bob the Prayer of Agreement." They further knew that callers were divulging intimate matters to the AT&T temporary employees. Plaintiff has made no showing that Defendants had information prior to the broadcast which would have cast doubts on the truth of their statement. Therefore, Plaintiff's challenge to Defendants' statement must fail.

Tilton's College Days

PrimeTime I and PrimeTime II reported:

"SAWYER: [voice-over] But an old buddy of Tilton' s remembers how in college it was all a big joke.

> FORMER TILTON FRIEND: Oh dear God! Come into this young woman's life! Heal tonight!
>
> * * * *
>
> FORMER TILTON FRIEND: Robert Tilton, as I knew him, was practicing to become a salesman. That was his concept of success, was to be -
>
> SAWYER: [voice-over] This man, who wanted anonymity, is just one of several old friends of Robert Tilton who talked to us.

[RADIO MUSIC PLAYING]

RADIO ANNOUNCER: You're listening to XERF, the (INAUDIBLE) . . .

SAWYER: [voice-over] He remembers when they were in college, they would use drugs or get drunk and go off to tent revivals as a kind of sport.

FORMER TILTON FRIEND: And we'd be drunk and go down front, fall to our knees, speak in tongues. [PrimeTime I: I think that anybody who was there would realize that some people are going to believe anything and all you have to do is capitalize on that belief.]

REV. MARVIN GORMAN: Loose him (INAUDIBLE). . .

SAWYER: [voice-over] Tilton and his friends started developing parodies, so-called "Jesus raps" of their own.

FORMER TILTON FRIEND: Oh, dear God! Come into this young woman's life! Heal tonight! She has a need to find Christ.

TILTON: O God! In the name of Jesus, we believe in prayer! We believe in miracles!

FORMER TILTON FRIEND: I personally thought I was a lot better at it than he was.

SAWYER: [voice-over] Tilton, who never finished college, admits he was a drug user, but says he was saved when some people came to his house and explained Christ.

TILTON: I just changed. I just fell in love with everybody!

SAWYER: [voice-over] But he never tells followers how he and his friends talked about running preacher scams and cashing in.

FORMER TILTON FRIEND: We said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section, and fly around the country and get rich.

TILTON: We sold everything that we had, bought an old ragged tent and a big old truck and a travel trailer and we headed out to tell people about this gospel of Jesus."

In support of his motion and in response to Defendants' motion, Plaintiff contends that in both PrimeTime I and PrimeTime II, the statements of John Michael Taylor, "Tilton's former friend," together with Defendant, Diane Sawyer's surrounding comments and the context thereby created, portrayed Plaintiff as a man devoid of religiosity, who mocked the very thing for which he now stands. Plaintiff argues that Defendants' statements that while in college, Plaintiff participated in tent revival meetings as sport and in jest while drunk, joked with friends by practicing so-called "Jesus raps" and religious parodies, and hatched a plan to get rich by engaging in a revival preaching scam, were lies and were broadcast with actual malice. Plaintiff argues that in broadcasting these statements, Defendants relied on their interview with John Michael Taylor. However, according to Plaintiff, Mr. Taylor stated, in that interview, that he could not say if Plaintiff actually did what Defendants stated he did in the broadcasts. Plaintiff states that the tent revival disgrace referred to by Mr. Taylor was a fad fueled by a movie entitled "Elmer Gantry." It occurred in 1963 at North Texas State

University and involved John Michael Taylor and two of his friends Doug McLeod and Michael Harbison. Plaintiff asserts that he never attended North Texas State University. Moreover, Plaintiff asserts that Doug McLeod has testified that he never knew Plaintiff and Michael Harbison has testified that he never remembered Plaintiff participating in the revival sport.

Plaintiff also asserts that ABC's raw footage videotape of Mr. Taylor's interview shows that Mr. Taylor, in speaking of the fad, used the pronoun "we" to refer to a coterie of college friends, which did not include Plaintiff, and used the pronoun "he" to refer to Plaintiff. Plaintiff thus contends that the statements "[a]nd we'd be drunk and go down front, fall to our knees, speak in tongues" did not include Plaintiff as was represented by the broadcast.

In addition, Plaintiff asserts that the broadcasts showed Mr. Taylor stating "[w]e said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section and fly around the country and get rich." ABC's raw footage videotape, however, shows that Mr. Taylor stated "I said" rather "we said." Plaintiff argues that Defendants purposely edited Mr. Taylor's statement "I" to become "we" to include Plaintiff making that statement. According to Plaintiff, Defendants knew that statement was false and their own executive producer, Richard Kaplan, admitted that such a change was not a proper editing practice.

Plaintiff further asserts that Defendant, Diane Sawyer, stated in the broadcasts that Plaintiff made up "Jesus raps." ABC's raw footage, however, shows that Mr. Taylor never used the phrase "Jesus raps" when describing his mockery of revival preachers. Plaintiff contends that he never conducted any "Jesus raps" with Mr. Taylor or anyone else.

Plaintiff further contends that after PrimeTime I aired, he stated on his Success N Life program that Mr. Taylor's statements

were a lie. In spite of Plaintiff's statements, which were provided to Defendants, and their own raw footage, Defendants rebroadcast the segment.

Defendants, in response and in support of their summary judgment motion, argue that despite Plaintiff's statements, they had a sufficient basis for believing that Plaintiff mocked preachers and attended tent revival meetings during his college days as a kind of sport. Defendants contend that Mr. Taylor, in the interview, did say that Plaintiff imitated preachers and that he was present on more than one occasion at tent revival meetings. Defendants also contend that Mr. Taylor indicated that Plaintiff participated in and was in agreement with discussions of a becoming a revival preacher in order to get rich. Although Mr. Taylor used "I said" instead of "we said" in part of the interview when referring to becoming a revival preacher to get rich, he later used "we said" when referring to that same topic. Defendants state that the edit change to "we said" was for clarity reasons and did not alter the meaning of the statements in any way. Defendants further contend that even though Plaintiff did not attend North Texas State University with Mr. Taylor in 1963, Defendants state that he did subsequently attend Cooke County Junior College with Mr. Taylor. Mr. Harbison also attended Cooke County Junior College during that time and was acquainted with Plaintiff.

As to the issue of actual malice, Defendants argue that Plaintiff cannot show with clear and convincing evidence that Defendants broadcast Mr. Taylor's statements knowing they were false or with serious doubts as to their truth. Defendants contend that Defendant, Robbie Gordon, who conducted the interview, confirmed Mr. Taylor's recollections with others and she independently verified the facts related to her by Mr. Taylor. According to Defendants, Ms. Gordon believed what Mr. Taylor had told her and had no reason to doubt his statements.

Having reviewed the evidence, the Court finds that Plaintiff has failed to present sufficient evidence to raise a genuine issue of fact that Defendants knew the falsity of the statements made in the broadcast or had serious doubts as to the truth of the statements. Although Plaintiff states that ABC's raw footage shows that Mr. Taylor did not actually say that Plaintiff went down front at tent revival meetings, fell on his knees and spoke in tongues, it is clear from the interview that Mr. Taylor stated that Plaintiff was present at the tent revival meetings and was a part of the group that was involved in such behavior. Indeed, Mr. Taylor stated:

> "It's been so long ago that I, I can't recall the specific time and place him there to swear to it. I can say that it took place more than one time. That it was in the behavior pattern of the group that we ran with. That it was known to all of us. That it happened and was talked about. And that he was Presents and he was in that group. Whether or not he actually went down to the front, and fell on his knees, and quaked, and spoke in tongues, I cannot say. But he was running with the group that did, and that made fun of the preachers, and that held that kind of behavior in high contempt."

(Joyce 2nd Aff., Ex. 5 at p. 6). (Emphasis added).

As to "Jesus raps," it is true that Mr. Taylor did not use that phrase in referring to parodies that were performed at parties. Notwithstanding the editorializing of Defendants, the evidence does reveal that Mr. Taylor did tell Defendants that he and Plaintiff

performed parodies involving preaching.[19] Mr. Taylor specifically stated:

> We had a parody that we would drop into at parties, of preaching. And we would emulate revival preachers that we had heard on the air at parties, and, and everyone would praise the Lord and fall on their knees, . . . . And he was there, yes, he was there.
>
> * * * *
>
> Tilton, trying to emulate the preachers at the time was-I'm sure that he-- we all tried to throw a pitch at one time or another. It was just part of our standard pattern, our repartee. We would throw it back and forth. Everyone would attempt it. I personally thought I was a lot better at it than he was.
>
> * * * *
>
> When we were at-- when we were at parties and we would get into our preacher mode, all of us would throw lines back and forth. It was like a group of comedians standing around and throwing lines back and forth to one another. There was nobody that wasn't included. We all took part in this. I mean, everyone had their own little special part of it. And we played off of one another. It, it truly was like a bunch of stand up comedians, trying to work out a routine.

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[19]With regard to the "Jesus raps" characterization, the Court relegates this to an editorialization and finds it represents a non-actionable opinion. See, e.g., Metcalf, 828 F.Supp. at 1529-1532; Miskovsky, 654 P.2d at 593.

(Joyce 2d Aff., Ex. 5 at pp. 5, 7, & 8). (Emphasis added).

Given these statements, Plaintiff cannot show that Defendants knew it was false in stating that Plaintiff had developed parodies.[20]

In regard to the "I/We" change, the Court finds that such editing change does not establish actual malice. An edited or altered quotation is not sufficient to establish actual malice "unless the alteration results in a material change in the meaning conveyed in the statement." Masson, 501 U.S. at 517. In the instant case, the edited change to "we said" did not materially change the meaning conveyed by Mr. Taylor. During the interview, Mr. Taylor, in response to Ms. Gordon's question about joking with Plaintiff, did state:

> We said if we didn't, if, after we graduated that we had a hard time making a living, or if we weren't making the kind of money that we wanted to, that what we should do, would be to grab an audience, become a revival preacher. And through that means we'd be able to be rich.

(Joyce 2nd Aff., Ex. 5 at p. 6).

The meaning conveyed by Mr. Taylor in the interview was that he and Plaintiff used to joke about becoming revival preachers to get rich. The alteration of the "I" to "we" did not change the meaning which had been conveyed by Mr. Taylor. Although Plaintiff contends that Mr. Taylor was not referring to Plaintiff when using "we," the Court finds that no reasonable jury would find that Mr. Taylor did not include Plaintiff when referring to "we" and no reasonable jury would find by clear and convincing evidence that Defendants acted with actual malice in making the edited change.

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[20]The Court also notes Plaintiff has not presented any evidence to show that Defendants had any reason to doubt the credibility of John Michael Taylor or the truthfulness of his statements.

**Tilton's Start**

PrimeTime I and PrimeTime II reported:

"SAWYER: And by 1981, [Tilton] had hit the big time? How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a $1.3 million loan, though Tilton claims he never met the man. And after Tilton got money, he got a new image, too - a permanent wave for his hair, plastic surgery and, like his good buddy, Jim Bakker, a talent for tears on demand."

In their motion, Defendants assert that they are entitled to summary judgment in regard to Plaintiff's challenge of the above--quoted segments. They contend that there is no evidence to suggest they did not believe the accuracy of their statements. Defendants state that they conducted an extensive investigation of the relationship between Plaintiff and Herman Beebe, which Plaintiff has conceded. Through that investigation, they learned that Plaintiff had obtained a $1.3 million loan from Herman Beebe's bank in 1980, that press accounts as far back as 1976 linked Herman Beebe to organized crime and that Plaintiff's spokeswoman was quoted in the Dallas Morning News as saying Plaintiff did not know Herman Beebe. Defendants also state that their report, contrary to Plaintiff's claim, did not imply that Plaintiff was linked to drug smuggling and organized crime. As to the term "courted," Defendants contend that it was an editorial characterization of Plaintiff's efforts to obtain a loan and was accurate based upon the facts. Defendants further argue that the term is not actionable and it is a constitutionally protected opinion. In regard to the other statements, Defendants contend that the evidence establishes the truth of the statements. Although Plaintiff claims Defendants conveyed that the loan proceeds received from Mr. Beebe were used to pay for his permanent wave and plastic surgery, Defendants state that no such fact was conveyed

by the report. Defendants explain that the broadcasts only stated that the permanent wave and the plastic surgery were obtained after the loan was received. The evidence, they argue, supports such facts. Defendants further state that the evidence shows that Jim Bakker was a friend of Plaintiff and that Plaintiff could cry on demand. Plaintiff, in response, contends that there is no evidence to support Defendants' contention that they reviewed the 1976 news article purportedly linking Herman Beebe to organized crime prior to the broadcasts. Moreover, Plaintiff contends that the article does not support their statement that Herman Beebe had links to organized crime. Plaintiff asserts that the article merely states he had associations with individuals who have organized crime connections. In addition, Plaintiff states that the statement in the report that Plaintiff "courted" Herman Beebe is false and not a protected opinion. Plaintiff concedes that he met Herman Beebe and that Mr. Beebe agreed to loan the Church money at their first meeting. However, he states that Mr. Beebe referred him to Dallas-Fort Worth Airport Bank. Plaintiff admits that he called Dale Anderson, an associate of Mr. Beebe, about the loan approximately three times but states he also referred Plaintiff to the bank. Plaintiff thereafter called the bank's president numerous times to obtain the loan. Plaintiff additionally states that the evidence shows that the segments of the broadcast falsely implied that Plaintiff hit the big time as a result of the loan. Plaintiff states that by 1981, he and his Church were in debt and were incurring more debt. Plaintiff states that the Church had to pay the Beebe loan with other loans, which resulted in further debt. He admits that the article in the Dallas Morning News stated that "Tilton declined to be interviewed, but said through a spokeswoman that he never met Beebe," but states that Defendants' statement that "though Tilton claims to have never met the man" is false. Furthermore, Plaintiff states that Defendants' report falsely implied that he obtain a permanent wave and plastic surgery from the

Beebe loan. According to Plaintiff, the permanent wave and the plastic surgery were obtained in 1989. As to Jim Bakker, Plaintiff states that he knew Jim Bakker only as a minister and not as a good friend. Plaintiff also contends that Defendant, Robbie Gordon's credibility is at issue in regard to the statement that Plaintiff can cry on demand.

The Court, having reviewed the evidence pertinent to the challenged segment, finds that Plaintiff has failed to present sufficient evidence to raise a question of fact that Defendants knew the challenged segments were false or that Defendants' subjectively entertained serious doubts as to their truth. Despite Plaintiff's contention, the evidence does reflect that Defendant, Robbie Gordon, reviewed the 1976 news article concerning Herman Beebe.[21] Although the report did not specifically state that Herman Beebe was linked to organized crime, it did state that Herman Beebe had associations with persons involved in organized crime. The evidence also shows that Ms. Gordon discussed the article with the author prior to the initial broadcast. As to "courting," the evidence shows that Ms. Gordon, in her investigation, was told that Plaintiff sought out Herman Beebe to obtain a loan. According to Ms. Gordon's affidavit, the inception of the relationship between Herman Beebe was described by Mr. Beebe's associate as "courting."[22] Ms. Gordon also reviewed prior to the initial broadcast, the Dallas Morning News article which quoted Plaintiff's spokeswoman as saying that Plaintiff did not know Herman Beebe. Plaintiff has not

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[21]Plaintiff's objection as to the admissibility of the news article on the basis that it had not been produced to him is without merit. It appears that the news article was produced to Plaintiff during the preliminary injunction hearing and it was admitted into evidence.

[22]In any event, the Court finds that the term "courted" fits the facts as it is defined in Random House Dictionary of the English Language 464 (2nd ed. 1987) as "to try to win the favor, preference, or goodwill of."

shown any evidence to establish that Defendants knew the statement "though Tilton claims never to have met the man" was false. Moreover, Plaintiff has not shown any evidence that Defendants knew that Plaintiff incurred more debt after receiving the Beebe loan and he has not shown that Defendants knew that Jim Bakker was not a good friend of Plaintiff. Furthermore, even if Ms. Gordon's testimony were discredited, Plaintiff has failed to present any affirmative evidence to show Defendants knew their statement that Plaintiff had a talent for tears on demand was false. Anderson, 477 U.S. at 256-57 (discredited testimony not normally considered a sufficient basis for drawing a contrary conclusion; plaintiff must present affirmative evidence in order to defeat properly supported summary judgment motion).

Finally, Plaintiff has failed to present sufficient evidence to establish an issue of fact that Defendants intended the alleged false implications that Plaintiff was connected to organized crime and drug smuggling, and Plaintiff paid for his permanent wave and plastic surgery from the loan proceeds received from Herman Beebe.

Tilton's Lavish Lifestyles

PrimeTime I reported:

"SAWYER: [voice-over] . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a four point five million lake view home . . . . Or is this the parsonage, in Fort Lauderdale, Florida . . . .

PrimeTime II also reported:

> SAWYER: [voice-over] . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a multi-million dollar lake view home . . . . Or is this the parsonage, in Fort Lauderdale, Florida . . . ."

In their motion, Defendants contend that they are entitled to summary judgment in regard to Plaintiff's challenge to the above-quoted segments. Defendants state that the gist of the challenged segments was not, as Plaintiff claims, that Plaintiff lived in more than one house at a time but rather that unbeknownst to -- and in stark contrast to -- his "poor and hurting" followers, he lived lavishly in "parsonages" that were hardly modest homes which the word conveys. According to Defendants, whether or not Plaintiff lived in more than one home at a time, or instead moved about from one to another does not affect the truth of the gist of their report. Defendants also state that the segments in regard to Plaintiff's houses was meant to describe Plaintiff's style of living which was quite lavish and to raise with viewers the question of whether the homes in which Plaintiff reside while pastor of his Church reflected his -- or their -- idea of a parsonage. As to Plaintiff's challenge regarding the Florida residence, Defendants state that the broadcasts accurately reported that bank records reflected Plaintiff, not the Church, as the owner.

Plaintiff, in response, contends that Defendants' parsonage segments were false in that they implied that Plaintiff was a liar because he possessed more than one parsonage as represented in his Church magazine. Plaintiff contends that at the time of the broadcasts, he no longer resided at the house in Rancho Santa Fe, California, and the residence in Fort Lauderdale, Florida was personally owned by Plaintiff and his wife rather than the Church. According to Plaintiff, Defendants acted with actual malice because Defendants knew Plaintiff only had one parsonage at a time; they knew he was living in a leased house on Krohn Court while the Church's new parsonage in Los Colinas was being remodeled; they knew he no longer resided at the house in Rancho Santa Fe, California; and they knew the Florida residence was owned by he and his wife personally.

The Court, upon review of the challenged segment and the record thereof, finds that Plaintiff has failed to raise a genuine issue of fact, even under the preponderance of the evidence standard, as to falsity of the segments and has failed to raise a genuine issue of fact as to actual malice on the part of Defendants. The Court finds that no reasonable jury would conclude the broadcasts at issue stated that Plaintiff owned four parsonages at one time. It is clear the challenged segments were only raising questions as to whether the residences were "parsonages." There is no dispute that Plaintiff lived at one time in all three of the residences shown on the broadcasts and that the Church maintained those residences as "Parsonages." With respect to the Florida residence, the broadcasts did accurately reflect that Plaintiff was the owner. Although Plaintiff contends that the broadcasts imply that he was a liar because he had four parsonages when he only reported one in the Church magazine, the Court finds that Plaintiff has failed to show that Defendants intended or knew the false implication of the broadcasts. Saenz, 841 F.2d at 1318 (to show actual malice, a plaintiff must prove "with clear and convincing evidence that the defendants intended or knew of the implications" he alleges).

PrimeTime I and PrimeTime II also reported:

"SAWYER: [voice-over] He also tells followers he'll pray for their miracles, so they should send him money.

> SAWYER: [voice-over] Like Jesus? The Bible says Jesus went to fast and separate himself from worldly things. Pastor Bob flew first class to a posh ski resort in Colorado, three suitcases for five days, a room with a fireplace -- he even brought his own television along -- while asking followers to send money."

Plaintiff challenges this report in the broadcasts on the basis that it states that Plaintiff will pray for his followers' miracles if they send money, that it states that he stayed in a "posh" ski resort in Colorado and that it implies the Colorado trip was a fundraising campaign. Defendants, in support of their summary judgment motion, contend that their statements were true. Defendants contend that the evidence shows Plaintiff repeatedly appealed to his followers for funds. Defendants state that Plaintiff in one appeal specifically asked his followers to "carefully write down the areas of your life (especially financial) where you want me to release my anointing on your behalf . . . and then write a check for the best possible gift that you can give!!!" (Gordon Aff., para. 19). With respect to his trip to Colorado, Defendants contend that Plaintiff undisputedly encouraged viewers to pay vows and the broadcasts repeatedly referenced the payment of vows. As to the "posh" reference, Defendants contend that it is not actionable as it is a constitutionally protected opinion.

The Court, having reviewed the submitted evidence, finds that Plaintiff has failed to present sufficient proof, even under a preponderance of the evidence standard, to show Defendants' statements were false. The evidence shows that Plaintiff, in his mailings, did ask his followers to write a check at the same time he asked for them to write down their prayer request. In addition, Plaintiff has admitted that he encouraged viewers to pay vows during the broadcasts in Colorado and the broadcasts referenced the payment of vows, tithes and offerings.[23]

The Court further finds that Plaintiff has failed to offer any evidence whatsoever which establishes with convincing clarity that

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[23]In regard to Defendants' use of "posh" to describe the Colorado ski resort, the Court finds the statement is not actionable. The Court finds no reasonable viewer or listener would interpret the statement as anything other than an expression of opinion. It is an evaluative characterization, not susceptible to proof of its truth or falsity See, e.g. Metcalf, 828 F.Supp. at 1529-1532.

Defendants knew of the falsity of their statements or that they had serious doubts as to the truth of those statements.

Guatemala

PrimeTime II reported:

"SAWYER: . . . And what about something else Tilton said in his deposition? He claims that his contribution to his mission in Guatemala is 100 percent of their needs.

ATTORNEY: --that you were going to provide--

PLAINTIFF: We would be-

ATTORNEY: --100 percent of the support that they need to maintain their operation.

PLAINTIFF: Yes, yes.

SAWYER: So we checked this out. We spoke to the onsite missionary in Guatemala who told us, in fact, Tilton is only a partial sponsor."

In his motion and in response to Defendants' motion, Plaintiff asserts that the statement that Plaintiff "claims that his contribution to his mission in Guatemala is 100 percent of their needs" misstates Plaintiff's deposition testimony. Plaintiff states that it was his original understanding that he would underwrite 100 percent of the expenses of the Guatemalan mission's ten schools and its mobile clinic, but that he did not mind if others gave additional funds. He also states that he explained in his deposition that even with intentions of full support of foreign missions, nominal donations were often received from other sources. Plaintiff further states that Hugo Morales, the Guatemalan missionary, testified that Plaintiff undertook to support the schools and the mobile clinic and supported those activities 100 percent.

Plaintiff contends that Defendants knew their statements in the above-quoted segment were untrue. According to Plaintiff, Defendants knew the meaning and content of Plaintiff's deposition testimony. They also possessed Church documents, including a copy of the monthly support check and a note on Guatemala School Support documenting Tilton's contribution of $12,200 a month to the Guatemala mission. Plaintiff states that Defendants also possessed audio tapes and notes of two phone calls to Mr. Morales showing that Mr. Morales' first response to questioning concerning Plaintiff's support was that Plaintiff financed the mission and its schools totally.

Defendants, in response and in support of their motion, contend that Plaintiff did say in his deposition that he provided 100% of the support for the Guatemalan mission. Defendants state that they spoke with Mr. Morales before the air of PrimeTime II and he told them that he received funding from Plaintiff through the Don Stewart Association; that he received approximately $12,000 a month from the Don Stewart Association; and that he did not know how much of that amount came from Plaintiff. Defendants also state that Mr. Morales told them that the money received from the Don Stewart Association paid for the mission's expenses and only 50% of the teachers, salaries for his 12 schools. In addition, Defendants state that discovery has confirmed that Mr. Morales receives an additional $2,200 a month which does not come from Plaintiff.

Having reviewed the evidence applicable to the challenged segment, the Court finds that Plaintiff has failed to raise a genuine issue of material fact as to whether Defendants had knowledge of the alleged falsity of the challenged statements or had serious doubts of the truth of those statements. Plaintiff has not presented any evidence to suggest that Defendants did not believe the statements of Mr. Morales that he received funding from Plaintiff through the Don Stewart Association; that he did not know how much of that amount came from Plaintiff and that the money received from the Don

Stewart Association paid only 50% of the teachers, salaries for his 12 schools. Even if Ms. Sutherland's credibility were at issue and her testimony were discredited, Plaintiff has also not submitted affirmative evidence to satisfy his burden of proof in regard to the issue of actual malice. Anderson, 477 U.S. at 256-257.

In regard to Guatemala, PrimeTime II also reported:

"SAWYER: And the Guatemalan government has gone public to say that Tilton and his promotional material exaggerate his contribution for personal gain, including his claim of a special invitation.

> PLAINTIFF: [television broadcast] I've been invited to be in the inauguration, the ball, all the celebrations and --
>
> SAWYER: That's not true, according to the president's spokesman, Fernando Muniz.
>
> FERNANDO MUNIZ: [through interpreter] No. That the president has invited him to attend the inauguration is by all means false, nor does he have any relation with the government. But we cannot take action against a swindler of this caliber."

In their motion, Defendants contend that they are entitled to summary judgment in regard to Plaintiff's challenge of the above-quoted segment. Defendants contend that Fernando Muniz confirmed in his deposition that he was the official spokesman for the president of Guatemala, that the president did not know who Plaintiff was and that neither the president nor his government invited Plaintiff to the inauguration. According to Defendants, Mr. Muniz explained that Plaintiff may have received an invitation from an evangelical church in Guatemala, but even if he had, it would not have been an invitation from the government. Based upon Mr. Muniz's testimony,

Defendants contend their statement that Plaintiff was not invited to the inauguration by the president of Guatemala was true.

Plaintiff, in response, argues that Defendants' statement that he was not invited to the inauguration was false. Plaintiff contends that he did receive an official invitation to the inauguration ceremony. He states that the invitation came from Harold Caballeros, who had obtained the invitation from one of the five groups that had given out invitations to the ceremony in addition to the president and congress of Guatemala. According to Plaintiff, he never claimed that the president invited him to the inauguration or that the president was his friend. Plaintiff maintains that the Church magazine article at issue, which Defendants had a copy of prior to the broadcast, only stated the "government" was so appreciative of Robert Tilton Ministries' contribution to the Guatemalan people that it sent an official invitation to Plaintiff. Plaintiff contends that Defendants' interview with Mr. Muniz solely focused on whether the president invited Plaintiff, whether he knew Plaintiff's work personally and whether he appreciated Plaintiff's work. Plaintiff further states that Mr. Muniz indicated to Defendants in the interview that it was probable that some international official of the president's party may have begun a relationship with Plaintiff.

The Court, upon review of the evidentiary materials, finds that even under the preponderance of the evidence standard, Plaintiff has not raised a genuine issue of fact as to the falsity of the report. Irrespective of the fact that the Church magazine article reported the government had invited Plaintiff and not the president, Plaintiff has failed to dispute the fact that he did not receive an invitation by either the government or the president. The evidence merely shows that he received an invitation from a religious minister. That minister, as Mr. Muniz testified and Plaintiff has not disputed, was not a part of the Guatemalan government.

In addition, the Court finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of fact as to whether Defendants knew the challenged segment was false or had serious doubts as to its truth. Although Plaintiff suggests that Defendants' possession of the magazine article which stated that the "government" had invited him and their decision to focus solely on whether an invitation was received from the Guatemalan president shows actual malice, the Court finds that such facts do not support a finding with convincing clarity that Defendants knew or were aware their statements in the broadcast were false.

**India Crusade**

PrimeTime II reported the following:

"SAWYER: [voice-over] And something else about Tilton the missionary. Repeatedly, he tells his viewers that their donations enable him to win souls around the world.

> TILTON: [television broadcast] And we totally - Word of Faith Ministries, you the Family Church, underwrites totally this particular evangelism unit.
>
> SAWYER: [voice over] Tilton tells followers they finance crusades in countries too poor to pay themselves.
>
> INDIAN TRANSLATOR: [Speaking Tamil]
>
> DAN MORALES: He's come all the way from America!
>
> SAWYER: [voice-over] So PT decided to follow Robert Tilton to India this past March.
>
> TILTON: Do you want to please God tonight?
>
> INDIAN TRANSLATOR: [Speaking Tamil]

SAWYER: [voice-over] Well, there was Tilton, passing the collection plates nightly.

[Visual of Tilton preaching, then a woman taking up an offering while Tilton was preaching, and then Tilton preaching]

If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars--

TILTON: . . . Hallelujah!

CONGREGATION: [Yelling in Tamil] . . . Hallelujah!

SAWYER: [voice-over] -- money taken from the people he himself calls 'the poorest people on earth.'

INDIAN MAN: [through interpreter] Tilton said, 'Please donate money. Please donate money,' so everybody got disappointed and then everybody whispered, 'This is not a crusade, it's a business.'"

In his motion and in response to Defendants' motion, Plaintiff claims Defendants falsely stated that he passed collection plates during the crusade in India. According to Plaintiff, ABC's cameraman's dope sheet for the taping of the India crusade, which provides the time sequence of the contents of the tapes, shows that the offering was actually taken up by a lady worker with a green bag. Plaintiff states that the offering was taken up at the request of Jack Harris, the coordinator for the India Crusade, before Plaintiff arrived to preach. Plaintiff also asserts that ABC's raw footage of Plaintiff shows that he did not pass a collection basket and was not present when the collection plates were passed among the crowd. He claims that ABC's raw footage instead shows another person

preaching as the offering was taken by the lady worker. Moreover, Plaintiff asserts that the offering was not taken up for Plaintiff and his Church. Rather, it was taken up for the benefit of local pastors in India.

Plaintiff contends that Defendants had full knowledge of their own raw footage and cameraman's dope sheets and were therefore aware that no collection was taken while Plaintiff was present, as portrayed by the broadcasts. Plaintiff argues that Defendants had no evidence that any collection of money was taken up by Plaintiff and Defendants had no evidence that any of the money collected went to Plaintiff. Plaintiff argues that Defendants' editing of the broadcast videotape to include Plaintiff's voice while the woman was passing the collection basket as well as Defendants, failure to investigate obvious sources who would have had knowledge of what happened in India demonstrates Defendants acted with actual malice.

Defendants, in response and in support of their summary judgment motion, argue that the evidence fails to establish that Defendants knew the alleged falsity of the report or had serious doubt about its truth. Defendants contend that they obtained their information about the India crusade from J.N. Sharma, an Indian journalist who covered the India crusade as an independent contractor for ABC News Intercontinental, Inc. According to Defendants,Mr. Sharma reported that he had personally attended Plaintiff's crusade, advertised in Madras as the Robert Tilton India Crusade. Mr. Sharma also reported that he personally observed Mr.Harris, a person whom he understood to be a representative of Plaintiff, ask the crowd at the crusade to donate money. Mr. Sharma reported that he observed Plaintiff on stage while the collection was taken up and observed many people contributing. According to Defendants, Mr. Sharma sent taped interviews of individuals who had been present at the India crusade. One of those interviewed stated that Plaintiff had

asked for the money and another stated that the followers of Plaintiff had begged for money.

In regard to Defendant, Diane Sawyer's statement that "if each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars, money taken from the people he himself calls 'the poorest people on earth,'" Defendants argue that Plaintiff cannot dispute that the crowds attending were poor and that money was collected from them. Defendants also state that Plaintiff cannot dispute that if each of the people had given just a few pennies that hundreds of thousands of dollars would have been collected. Defendants assert that the statement does not remark as to what was to be done with the funds after they were collected. According to Defendants, the gist of the report was that Robert Tilton India Crusade took collections from the masses of the desperately poor who attended the crusade.

Upon review of the record, the Court finds that Plaintiff has failed to submit sufficient evidence to raise a genuine issue of fact as to whether Defendants knew the alleged libelous statements were false or had serious doubts as to their truth. Plaintiff's only evidence in support of actual malice is that ABC's raw footage did not have a picture of Plaintiff on stage during the collection of the offering, that the footage was edited to show Plaintiff preaching when the collection basket was passed and Plaintiff's and other persons' testimony that Plaintiff was not on stage. Such evidence, however, does not establish with convincing clarity that Defendants knew the alleged falsity of the statements or had serious doubts as to the truth of these statements. Plaintiff has failed to offer any evidence to dispute the evidence that Mr. Sharma reported to Defendants that Plaintiff was on stage at the time the offering was collected and that he sent Defendants taped interviews with persons attending the India

crusade stating Plaintiff or his followers collected an offering.[24] Moreover, Plaintiff has failed to dispute that the crusade was the Robert Tilton India crusade and that offerings were collected during the crusade. Plaintiff has argued that if Defendants had interviewed Jack Harris and Reverend Dayanandhan, the assistant coordinator of the India crusade, they would have discovered the truth of the statements. However, a failure to investigate is not sufficient to establish actual malice. St. Amant, 390 U.S. at 732.

In his briefing, Plaintiff asserts that Mr. Sharma was acting within the scope of his employment with ABC and therefore actual malice can be imputed to ABC. The Court, however, disagrees. Plaintiff, in support of his assertion, relies upon Mr. Sharma's affidavit. Yet the affidavit does not establish Mr. Sharma was an employee of ABC or was acting within his employment when reporting on the India crusade. Indeed, the affidavit as well as the contract attached thereto indicates that Mr. Sharma was an independent contractor for ABC. Plaintiff has not presented any evidence to show to the contrary. Therefore, the Court finds Plaintiff's assertion not compelling.[25]

Other Missions

In PrimeTime II, Defendants reported (while showing names of five of missions):

> "SAWYER: And Tilton creates the impression that after he pays for his overhead and all

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[24]Plaintiff argues, in his response to Defendants' motion, that Mr. Sharma's credibility is at issue. However, Plaintiff has failed to show that Defendants had reason to doubt Mr. Sharma's credibility or the veracity of Mr. Sharma's reporting.

[25]Even if the evidence were adequate to establish Mr. Sharma was an employee of ABC, the Court finds that Plaintiff has failed to proffer sufficient evidence to show that Mr. Sharma knew what he reported was false or that he had serious doubts as to the truth of the report.

> that expensive air time, the money goes to good works like these his missions around the world. But we tracked down every charitable contribution of Tilton and we calculate he spends more in a year on billboards around Dallas than he does on all these missions combined."

Defendants, in their motion, contend that summary judgment is appropriate as the statements made in the above-quoted segment were true. Defendants assert that, during their investigation, they attempted to obtain information from the Church in regard to its missions, but the Church denied access to any information. Defendants contend the above-quoted segment of PrimeTime II was based upon the information they were able to gather from their investigation. According to that investigation, $180,000 per year was spent on billboards and $150,000 on missions. In addition, Defendants state that discovery has revealed that in 1991 Plaintiff spent $325,000 on leasing billboards and gave $177,272 to the five missions. Defendants thus argue that Plaintiff cannot establish falsity of the segment. Furthermore, Defendants argue that Plaintiff cannot establish actual malice in regard to the segment as Plaintiff has no evidence to show Defendants deliberately selected missions which received less contributions and has not shown that they had knowledge of the alleged falsity of their report or serious doubts as to the truth of the broadcast.

In response, Plaintiff concedes that the Church spent more on billboards than the five missions shown on the broadcast. However, Plaintiff contends that the gist of the report was to accuse Plaintiff of misleading his followers concerning support of missions and denigrate the amount of his support. Plaintiff asserts that Defendants knew the gist was false.

Even if the Court were to apply the preponderance of the evidence standard to the issue of falsity, the Court finds that Plaintiff

has failed to raise a genuine issue of material fact that the challenged segment or the gist of that segment was false. In regard to the issue of actual malice, the Court finds that Plaintiff has failed to present any proof with convincing clarity to raise a genuine issue of fact that Defendants knew the alleged falsity of the statements or that they published the statements with a high degree of awareness of the probable falsity.

PrimeTime II also reported:

"SAWYER: [voice over] Also after our broadcast, Tilton attacked us for what we said about his missions, the ones he implies are his own, like this one. Here's how he promotes it on his TV show.

> ANNOUNCER: And Wings of Mercy, a center sponsored by Robert Tilton Ministries --
>
> SAWYER: [voice-over] The promotion makes you think it is Tilton's center, but listen to his deposition.
>
> ATTORNEY: Know what Wings of Mercy is?
>
> PLAINTIFF: Not really.
>
> SAWYER: No wonder, since PrimeTime has learned that Tilton's contribution to that mission is just $300 a month."

In his motion and in response to Defendants' motion, Plaintiff contends that Defendants knowingly created a context in their broadcast whereby the viewer would understand that Plaintiff's contribution to his missions, such as Wings of Mercy, was "meager, paltry and insignificant." Plaintiff claims that he did contribute $300 a month to the Wings of Mercy shelter and that this amount was the amount needed by the shelter. Plaintiff contends that he provided

support to the mission when no one else would. Thus, his contribution was not negligible as the broadcast implied.

Defendants, in response and in support of their motion, contend that their broadcast was true. Defendants state that it is undisputed Plaintiff did promote on his television program that Wings of Mercy was a center sponsored by Robert Tilton Ministries; that his contribution was only $300 per month and that he did not recall in his deposition what Wings of Mercy was. Defendants state they believed the information to be true.

Having reviewed the challenged segment and the evidence related thereto, the Court finds that Plaintiff has failed to raise a genuine issue, under a preponderance of the evidence standard of proof, that the broadcast was false. Moreover, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether Defendants knew the report was false as alleged or entertained serious doubts as to the truth of the broadcast.

**Additional Incidents of Alleged Actual Malice**

The last three paragraphs of Plaintiff's statement of material facts in his partial summary judgment motion set forth facts addressing the issue of "malice". The first paragraph refers to a July 1992 newspaper article purporting to quote Defendant, Diane Sawyer, as saying "[w]hen I saw Tilton on TV and what he was doing, I was appalled, . . . . He needs to be stopped." The second paragraph refers to affidavit testimony from Plaintiff that prior to PrimeTime I, he directed the Church's attorney to respond to Defendant, Kelly Sutherland's request for an interview and decline such an interview; that at his direction, the Church offered to review any broadcast to inform PrimeTime Live of errors, if any, and to furnish any documents necessary to prove the errors; that at his direction, the Church advised PrimeTime Live that the Church would enter into a contract with PrimeTime Live that the Church would not

seek in any manner prior restraint of the planned broadcast if allowed to review the broadcast; but that ABC would not allow the Church to know the planned content of the broadcast to correct errors, if any. The third and final paragraph refers to handwritten notes of Defendant, Kelly Sutherland, taken during a telephone conversation with Defendant, Robbie Gordon, which state "no fraud to be had on this guy -- can have fun with him though."

Defendants responded to Plaintiff's statement of facts believing the paragraphs pertained to the issue of actual malice. Defendants addressed each of the paragraphs and argued that none of the facts stated proved actual malice. In reply to Defendants' response, Plaintiff states that the paragraphs have nothing to do with knowledge of falsity or publication with reckless disregard as to truth or falsity. He states they are concerned with malice, which is a prerequisite for punitive damages under Oklahoma law. Nonetheless, Plaintiff goes on to state that "evidence of ill will or ulterior motive, 'malice,' can bolster the inference of "actual malice," citing to Harte-Hanks, 491 U.S. at 667 ("a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.") (Plaintiff's Reply to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 7).

Because of Plaintiff's latter statement that evidence of malice may bolster the inference of actual malice, the Court has reviewed the evidence in regard to the issue of actual malice.[26] The Court initially opines that the July 1992 newspaper article is not proper evidence for submission on summary judgment as it is inadmissible

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[26]In regard to the issue of "malice," the Court finds that the evidence cited by Plaintiff is irrelevant since the Court has found that Plaintiff is not entitled to summary judgment on his claims.

hearsay and Plaintiff has not shown that the author of the article will be available for cross-examination at trial. Fed.R.Evid. 802; Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F. 2d 919, 924 (2d Cir. 1985) (inadmissible hearsay may not be considered on summary judgment motion absent a showing that admissible evidence will be available at trial). However, even if the evidence were admissible and proper for submission, the Court finds that the newspaper article as well as the other evidence cited by Plaintiff in his statement of material facts are not sufficient alone or in combination with all other evidence presented by Plaintiff to establish with convincing clarity that Defendants had knowledge the alleged defamatory statements in PrimeTime I and PrimeTime II were false or that they entertained serious doubts as to the truth of those statements.

Based upon the foregoing, the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland is **GRANTED** and the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton, is **DENIED**. Judgment shall issue forthwith.

ENTERED this 19th day of June, 1995.

/s/ Michael Burrage

MICHAEL BURRAGE

UNITED STATES DISTRICT

No. 95-5152

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT G. TILTON,

Plaintiff - Appellant

v.

CAPITAL CITIES/ABC INC., a New York corporation; AMERICAN BROADCASTING COMPANIES, INC., a Delaware corporation; ABC NEWS, INC., a Delaware corporation; DIANE SAWYER; ROBBIE GORDON; KELLY SUTHERLAND,

Defendants - Appellees.

FILED
United State Court of Appeals
Tenth Circuit

AUG 27 1996

PATRICK FISHER
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(D. Ct. No. 92-C-1032-BU)

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J.C. Joyce, Joyce and Pollard, Tulsa, Oklahoma, appearing for the Appellant.

Floyd Abrams, Cahill, Gordon & Reindel, New York, New York (Susan Buckley and David G. Januszewski, Cahill, Gordon & Reindel, New York, New York, and Clyde A. Muchmore, Crowe & Dunlevy, Oklahoma City, Oklahoma, with him on the brief) appearing for the Appellees.

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Before TACHA, BRISCOE, and MURPHY, Circuit Judges.

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TACHA, Circuit Judge.

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Robert G. Tilton sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., ABC News, Inc., and several employees of American Broadcasting Companies, Inc., for libel and false invasion of privacy arising out of the broadcast of two television programs in 1991 and 1992. All defendants moved for summary judgment on the merits of Tilton's claims, and corporate defendants Capital Cities/ABC, Inc., and ABC News, Inc., separately moved for summary judgment on the additional ground that Tilton could not establish a basis for imputing liability to them.

During the course of the proceedings, the district court denied Tilton's motion to compel defendants to disclose the identity of confidential sources. In addition, the court granted both the defendants' motion in limine concerning the newsperson's privilege and their motion to exclude the testimony of Tilton's expert linguist. On May 24, 1995, the district court granted the motion of defendants Capital Cities/ABC, Inc., and ABC News, Inc., on the ground that neither entity had been involved in the preparation or broadcast of the programs. On June 19, 1995, the district court granted summary judgment to the remaining defendants.

Tilton appeals, arguing that the district court erred by (1) granting summary judgment to defendants on the merits of his claim, (2) granting defendants' motion asserting the newsperson's privilege, and (3) excluding the testimony of his expert linguist. After careful review of the record, we adopt the analysis of the district court. Accordingly, we AFFIRM for substantially the reasons given by the district court and ORDER that the court's orders of June 19, 1995 (concerning the merits), May 24, 1995

(concerning defendants' motion in limine), and May 26, 1995 (concerning the testimony of the expert linguist) be published.

**No. 95-5152**

(D.C. No. 92-C-1032-BU)

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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ROBERT G. TILTON,

Plaintiff - Appellant

v.

CAPITAL CITIES/ABC INC., a New York corporation; AMERICAN BROADCASTING COMPANIES, INC., a Delaware corporation; ABC NEWS, INC., a Delaware corporation; DIANE SAWYER; ROBBIE GORDON; KELLY SUTHERLAND,

Defendants - Appellees.

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ORDER

Entered October 7, 1996

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Before TACHA, BRISCOE AND MURPHY, Circuit Judges.

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This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to

all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

/s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

No. 92-C-1032-BU

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON,
an individual,

Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; AMERICAN BROADCASTING COMPANIES, INC., a Delaware corporation; ABC NEWS, INC., a Delaware corporation; DIANE SAWYER, an individual; ROBBIE GORDON, an individual; and KELLY SUTHERLAND, an individual.

Defendants.

FILED

JULY 26 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

## FINAL AMENDED COMPLAINT

**JURY TRIAL DEMANDED**

Plaintiff Robert G. Tilton, an individual, alleges for his Final Amended Complaint the following:

## NATURE OF THE ACTION

1. This is an action seeking damages from the Defendants for publishing false, unprivileged, libelous and

defamatory statements about Plaintiff and for publishing statements which portray Plaintiff in a false light during the course of a television program that was broadcast by Defendants on November 21, 1991, and July 9, 1992, and an action in equity addressed to the Court's equitable powers to balance the equities between the parties and seeks a permanent injunction to prohibit the Defendants and each of them from ever rebroadcasting the lies, half-truths and false light portrayals concerning Pastor Tilton as set forth herein.

## JURISDICTION AND VENUE

2. Jurisdiction is founded on diversity of citizenship pursuant to 28 U.S.C. § 1332 and on federal question jurisdiction pursuant to 28 U.S. § 1331.

3. Plaintiff is a citizen of the State of Texas. The individual Defendants reside outside Oklahoma. The corporate Defendants are corporations incorporated under the laws of the States of New York and Delaware (the "Corporate Defendants"), having their principal places of business in states other than the State of Texas. The matter in controversy exceeds the sum of Fifty Thousand Dollars ($50,000), exclusive of interest and costs, as to Plaintiff's first, second and fourth claims for relief. Plaintiff's third claim for relief is addressed to the sound discretion of the Court and the exercise of equitable powers and seeks no monetary damages.

4. The Corporate Defendants are engaged in the business of producing and broadcasting television programs in interstate commerce. The Corporate Defendants broadcast a weekly program called *PrimeTime Live* ("*PrimeTime*"), to television stations located in the State of Oklahoma, and those television stations re-broadcast these programs to persons located throughout the State of Oklahoma. The individual defendants were employees of the Corporate Defendants at all relevant time and engaged in tortious acts which caused injury to the Plaintiff within the State of Oklahoma.

**5.** Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2) as a substantial part of the events giving rise to these claims occurred in the Northern District of Oklahoma.

**6.** This Court has personal jurisdiction over the Defendants pursuant to 12 Okla. Stat. § 2004(F).

**PARTIES**

**7.** Plaintiff, Robert G. Tilton ("Pastor Tilton"), is an individual residing in Dallas County, Texas.

**8.** Defendant, Capital Cities/ABC Inc. ("Capital Cities"), is a New York corporation, with its principal place of business located in New York, New York, and was at all material times herein doing business in the State of Oklahoma.

**9.** Defendant, American Broadcasting Companies, Inc. ("ABC"), is a Delaware corporation, with its principal place of business located in New York, New York, and was at all material times herein doing business in the State of Oklahoma. ABC is a subsidiary of Capital Cities.

**10.** Defendant, ABC News, Inc. ("ABC News"), is a Delaware corporation, with its principal place of business in New York, New York and was at all material times herein doing business in the State of Oklahoma. ABC News is a subsidiary of Capital Cities.

**11.** Defendant, Diane Sawyer ("Sawyer"), is an individual residing in New York, and is an employee of ABC, and is a correspondent and anchor for ABC, and is a co-host of *PrimeTime*. Plaintiff believes, and therefore alleges, that Sawyer was at all times acting individually and as an agent and/or employee of each of the Corporate Defendants.

**12.** Defendant, Robbie Gordon ("Gordon"), is an individual who resides outside Texas, and is an employee of ABC

and a producer for *PrimeTime*. Plaintiff believes, and therefore alleges, that Gordon was at all times acting individually and as an agent and/or employee of each of the Corporate Defendants.

13. Defendant, Kelly Sutherland ("Sutherland"), is an individual residing in New York, and at all relevant times was an employee of ABC and an associate producer for *PrimeTime*. Plaintiff believes, and therefore alleges, that Sutherland was at all times acting individually and as an agent and/or employee of each of the Corporate Defendants.

**BACKGROUND**

14. Plaintiff Tilton's Complaint centers on the broadcast and re-broadcast of a certain telecast of the television tabloid program, *PrimeTime*, which featured "an undercover *investigation* of evangelists, three preachers who manipulate followers into giving millions of dollars every year."[1] One of the three targets was Pastor Tilton. The program at issue first aired on November 21, 1991 ("first broadcast"), during what is commonly known as ratings "sweeps week." That same program was broadcast again with some minor changes to the first broadcast plus some additional "follow-up" material on July 9, 1992 ("second broadcast").

15. Both broadcasts contained *inter alia* the following three defamatory statements of and concerning Pastor Tilton, which are libelous per se and, if true, constitute mail fraud:

- Pastor Tilton claims the "holy water" he sends to viewers is from the River Jordan; Sawyer says it's from Taiwan.
- Pastor Tilton represents that he personally prays over prayer requests; Sawyer says

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[1]All quotes are from transcripts of the broadcasts unless identified otherwise.

most of the prayer requests mailed to Pastor Tilton are thrown in the garbage at the bank in the marketing research center before Pastor Tilton gets them;

- Pastor Tilton states in his Church's magazine that he provides financial support to an orphanage in Haiti; Sawyer says he doesn't.

The first broadcast contained the following statements which also libel and defame Pastor Tilton and/or portray Pastor Tilton in a false light ("defamatory statements"):

SAWYER: (voice-over) He also tells followers he'll pray for their miracles, so they should send him money.

SAWYER: (voice-over) Like Jesus? The Bible says Jesus went to fast and separate himself from worldly things. Pastor Bob flew first class to a posh ski resort in Colorado, three suitcases for five days, a room with a fireplace - he even brought his own television along - while asking followers to send in money.

So we decided to take hidden cameras to see what we could learn about Robert Tilton's fund-raising. It led us to the nerve center of his ministry, the company that organizes his direct mail. It's called Response Media.

JIM MOORE: Bob is doing far better than anyone knows.

SAWYER (voice-over): Jim Moore is president of Response Media. He handles not only Tilton, but a number of big corporate accounts. We told Moore that we were media consultants for this man, Dallas minister Ole Anthony. We asked him to show us how to start a big money ministry like Tilton's.

Mr. MOORE: Give them something free. You know, we ought to mail you the latest copy of "X" and get their name and address. New names is the key, new names. Just think "New names."

SAWYER: (voice-over) We learned that once people give you their names, it's easy to keep them on the hook. You mail them something with a gimmick in it.

SAWYER (voice-over): Tilton sends out an avalanche of things he asks viewers to send back to him - "miracle prayer cloths" he promises to touch and place upon an altar, cords he says he'll place on a "wall of deliverance," arrows he'll use to take aim at a sufferer's needs, a tracing - place your hand there and he'll put his hand there, too. There's holy water from the River Jordan, 'miracle anointing oil' - though Moore said some of the items come from that holy place, Taiwan.

Mr. MOORE: We get stuff from Taiwan.

SAWYER: (voice-over) The letters accompanying the items are written by ghost writers to pressure followers to write back and make donations, too. Does it work? People send them in by the truckloads. It's a great marketing scheme.

. . .

SAWYER: (voice-over) And when the letters arrive, they're processed so the company knows which fund-raising appeals you can use to squeeze followers for the most donations.

Mr. MOORE: We take the clients' files and we run them up against demographic information and create a profile of who their people are, how many people have cars that are new-

SAWYER: (voice-over) So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar opportunities.

. . .

SAWYER: (voice-over) And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these, his missions around the world. But we tracked down every charitable contribution of Tilton we could find and we calculate he spends more in a year on billboards around Dallas than he does on all of these missions combined.

And what about this mission, Tilton's orphanage in Haiti. We kept thinking about Bob Jones and how he told us you could just fix yourself up a sign and claim an orphanage.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER: (voice-over) Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no.

. . .

SAWYER: (voice-over) And Tilton's marketing director made it clear, when it comes to money for missions, Tilton is very smart. He's careful not to say what donation goes where so he can avoid, again, how Jim and Tammy got caught.

. . .

FORMER TILTON FRIEND: Robert Tilton as I knew him was practicing to become a salesman. That was his concept of success, was to be-

SAWYER: (voice-over) This man, who wanted anonymity, is just one of several old friends of Robert Tilton who talked to us. He remembers when they were in college, they would use drugs or get drunk and go off to tent revivals as a kind of sport.

FORMER TILTON FRIEND: And we'd be drunk and go down front, fall to our knees, speak in tongues. I think that anybody who was there would realize that some people are going to believe anything and all you have to do is capitalize on that belief.

SAWYER: (voice-over) Tilton and his friends started developing parodies, so-called "Jesus raps" of their own.

FORMER TILTON FRIEND: "Oh, dear God! Come into this young woman's life! Heal tonight! She has a need to find Christ."

> Rev. TILTON: O God! In the name of Jesus, we believe in prayer! We believe in miracles!

FORMER TILTON FRIEND: I personally thought I was a lot better at it than he was.

. . .

SAWYER: (voice-over) But he never tells followers how he and his friends talked about running preacher scams and cashing it.

FORMER TILTON FRIEND: We said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section, and fly around the country and get rich.

> Rev. TILTON: We sold everything that we had but an old ragged tent and a big old

truck and a travel trailer and we headed out to tell people about this gospel of Jesus.

SAWYER: (voice-over) That was 1974, when Tilton started out. And by 1981, he had hit the big time. How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a $1.3 million loan, though Tilton claims he never met the man. And after Tilton got the money, he got a new image, too - a permanent wave for his hair, plastic surgery and, like his good buddy Jim Bakker, a talent for tears on demand.

. . .

SAWYER: (voice-over) And we were there one day with hidden camera when he made it clear the tears of his followers are good for the TV pitch, too.

Rev. TILTON: But I'm thinking, some of these people crying, you know, the ones with the emotions, the crying, the bending over, the running, and then the crowd shots and all that going on.

. . .

SAWYER: (voice-over) And if Hardy felt he was taking advantage of the callers, imagine how this woman felt, Elizabeth Montcalm, a temporary employee at AT&T. When Tilton went to Israel last year, she and others at AT&T were asked to pose as Tilton prayer ministers.

. . .

SAWYER: (voice-over) . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a $4.5 million lake view home. . . .

Or is this the parsonage, in Fort Lauderdale, Florida . . .

. . .

SAWYER: (voice-over) But how much does Tilton really care about the beat-up and the hurting? We kept thinking about something the head of the direct mail operation told us, that the mail doesn't go to Tilton. It's forwarded unopened to Tilton's bank in Tulsa. So the bank opens the followers' mail, not to share the agony, but to get the money.

INTERVIEWER: The bank opens the letters that come back in?

Mr. MOORE: That's right. And takes your money and puts it in your account. All we get is the paper document and how much the person gave.

SAWYER: (voice-over) And those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them too? If some make it to Tilton, there are thousands that didn't. We found them in the garbage at the bank in the marketing research center. The "angels of God," the prayer cords, the arrows - this person wanted his aimed at getting a real dad - the tracing where Tilton said he'd place his hand, ripped up by the bank. We found heart-breaking appeals from followers and letters like this one. It came with personal photographs for Pastor Bob and a prayerful message. It also came with a $7,000 pledge. The money probably made it to Tilton. The prayers went in the trash.

**16.** At the time the actions complained of began, Pastor Tilton was the president of Word of Faith World Outreach Center Church, Inc., a Texas not for profit corporation, which was dissolved on March 30, 1992. Pastor Tilton is now the principal pastor of Word of Faith World Outreach Center Church ("the Church"), which has a local congregation of over 8,000 members in Farmers Branch, Dallas County, Texas, and a world-wide television congregation.

**17.** In addition to ministering to the Church's local congregation in Farmers Branch, Pastor Tilton did and does conduct an extensive television ministry through the Church's weekly program, *Sunday Morning Live*, and through a daily program, *Success ·N· Life*, which was and is telecast several times a day in numerous locations. Through his television ministry Pastor Tilton has become a public figure.

**18.** *PrimeTime* was and is a weekly television show carried on the ABC television network and produced by ABC News. While *PrimeTime* purports to be a "news" program, in format, style and content, it is more accurately described as a television tabloid - its level of journalism is more akin to the print media's tabloid *The Star* than to *The New York Times*. Unlike ABC's regular evening news program, where anchors may change but the program continues, the viability of *PrimeTime* is linked to its ratings performance. *PrimeTime* focuses on sensationalism, "investigative" exposes which skim the surface and intentionally disregard facts. *PrimeTime* is the antithesis of the serious, well-researched, carefully documented, investigative report. *PrimeTime* utilizes former regular news reporters and/or anchors, who lend an aura of credibility. *PrimeTime* is perceived by the general public as a responsible investigative news show whose programs are given a level of credibility they do not deserve.

19. Despite the affirmative representation that they had conducted a four month investigation, Defendants either did not seriously attempt to verify their allegations, or withheld the truth for their financial gain, and published those defamatory statements.

20. In producing this *PrimeTime* program, Defendants were not reporting on "hot news", but were creating/fabricating a "story" out of rumors, gossip, half-truths and lies, under the guise of a "report of an investigation."

21. Defendants, through their agents infiltrated or attempted to infiltrate the Church and the organizations serving or doing business with the Church. An ABC cameraman applied to work in the Church's television production unit without revealing his relationship to ABC. Other agents of the Defendants utilized their positions at the Church's bank and the Church's computer center to steal documents belonging to the Church.

22. Defendants knew, or should have known, that by claiming they had conducted an "investigation" that the public, including Pastor Tilton's followers, would equate Defendants' investigation with some semblance of credibility.

23. Prior to the first broadcast, the Church became aware of the "investigation" and the possible TV expose. ABC contacted Plaintiff and asked for an on-camera interview. During the course of several telephone conversations, Plaintiff informed Defendants that Plaintiff would not appear, but would review *PrimeTime*'s material and inform ABC of any errors or falsity in their report. Plaintiff further offered to enter into a written agreement that regardless of content Plaintiff would not attempt to enjoin the publication of *PrimeTime*, but if the broadcast contained false material Pastor Tilton would seek redress after publication. Defendants refused to provide Pastor Tilton or the Church with the program content they intended

to present or to allow him an opportunity to refute any charges of wrongdoing.

**24.** In the segment on Pastor Tilton, Defendants intentionally published defamatory statements which falsely accused Pastor Tilton of committing three separate actions that, if true, would constitute mail fraud. The Defendants either knew `iat each of those defamatory statements were false or acted with reckless disregard for the falsity of those defamatory statements.

**25.** Sawyer, Gordon and Sutherland began their "investigation" with the knowledge that not only did Pastor Tilton have a large congregation in Texas, but that through his TV ministry he had attracted a nationwide following of hundreds of thousands of television viewers, and that his popularity was rapidly increasing. As Sawyer stated in the subsequent broadcast of their "investigation": Pastor Tilton headed the "fastest-growing TV ministry" and was "the hottest minister on TV." Thus, Pastor Tilton was a very desirable target whose very popularity would increase the publicity (and all-important ratings) that would naturally arise from a mud-slinging attack.

**26.** In the program's introduction, Sawyer attempts to establish the credibility of the program with the following:

> SAWYER: . . . As we all know, the United States was founded on a principle of religious liberty and the laws give wide latitude to religious institutions here. Take television ministries. Even though they use public airwaves to raise tax-free funds, there's very little monitoring of what they broadcast. Members of Congress acknowledge that most of them are afraid of going near these sensitive political issues, so

> Prime Time decided to look around. The following is the result of a four-month ***investigation***. We culled through bank transactions, property records, data bases, traveled from the churches of Dallas to the banks in Oklahoma, to Poland and Haiti. We want to say right from the start that we are in no way questioning faith or religious belief of any kind. In fact, many of the people who helped in this investigation are devoted members of religious organizations, but believe it's important to know the ***facts***. So we took a close look at three ministers to see if the things being said and implied on the air are ***true***. . . . (Emphasis added)

Sawyer's statement appears to assure the viewer that PrimeTime is presenting a true and factual report of the results of an unbiased investigation.

A substantial portion of the investigation concerning Pastor Tilton occurred in Tulsa, Oklahoma.

27. While the Church's television shows originate in Dallas and viewers' calls are answered by prayer counselors in Dallas, the bookkeeping and mailing services, bank accounts and financial records of the Church were and are located in Tulsa, Oklahoma. The Church's mail is received in Dallas. The post office forwards the mail to Commercial Bank & Trust Co. (the "Bank") in Tulsa, where it is opened and any money is removed and deposited into a lockbox account. The mail is then sent on to Internal Data Management ("IDM") for processing. IDM records pertinent information and forwards the prayer requests to Pastor Tilton for prayer.

**28.** Defendants contacted and used as a major source of information on Pastor Tilton, Ole Anthony ("Anthony"), whom Defendants knew was a self-styled crusader against TV evangelists in general and Pastor Tilton in particular. Anthony has stated that he was "under the constant direction of an ABC producer, . . . Robbie Gordon."

**29.** Defendants or their agents stole prayer requests from the Bank and/or IDM and planted them in trash dumpsters belonging to those businesses for Anthony to "find" with the intent to frame Pastor Tilton with the crime of mail fraud.

**30.** Anthony directly participated in the *PrimeTime* investigation by making several trips to Tulsa to search through trash containers at the Bank's downtown and branch offices, at Pastor Tilton's and the Church's attorney's offices, and at IDM. Gordon filmed and took still photographs of Anthony searching through the trash dumpsters of the Bank and finding prayer requests which they had previously placed in those dumpsters. Those prayer requests Defendants subsequently alleged were discarded by the Bank without Pastor Tilton having seen them. Defendants together with Anthony conducted a hidden camera interview of the president of the Church's printer, Response Media.

**"Holy Water"**

**31.** Defendants seized on an opportunity to defame Pastor Tilton by misrepresenting the source of items sent to those who support Pastor Tilton.

**32.** Anthony and others who concealed their identities as agents of Defendants, went to Response Media in Tulsa and secretly filmed a meeting with its president, Jim Moore ("Moore") which was broadcast on *PrimeTime*:

> SAWYER: (voice-over) . . . So we decided to take hidden cameras to see what we could

> learn about Robert Tilton's fund-raising. It led us to the nerve center of his ministry, the company that organizes his direct mail. It's called Response Media.
>
> . . .
>
> SAWYER (voice-over): Jim Moore is president of Response Media. He handles not only Tilton, but a number of big corporate accounts. We told Moore that we were media consultants for this man, Dallas minister Ole Anthony.

33. Sawyer then took an answer given by Moore in response to a question from Anthony asking how to build a customer base, and in order to create a false impression, rewrote the question for the broadcast:

> SAWYER: (voice over) We asked him to show us how to start a big money ministry like Tilton's.
>
> MOORE: Give them something free.

Moore was unaware of Anthony's enmity towards Tilton or the identity of those with Anthony.

34. Using the same cut-and-splice technique, Sawyer referred in the broadcasts to items that Pastor Tilton sends out in his mailings and again deliberately misused a statement made by Moore:

> SAWYER (voice-over): Tilton sends out an avalanche of things he asks viewers to send back to him . . . There's holy water from the River Jordan, 'miracle anointing oil' - though Moore said some of the items come from that holy place, Taiwan.

MOORE: We get stuff from Taiwan.

The combination of the phrases, "holy water from the river Jordan" and "that holy place, Taiwan", and the out-of-context "quote" from Moore in the same sentence, clearly conveys the impression to the viewer that Pastor Tilton was sending water from Taiwan that he had claimed was Holy Water from the River Jordan.

**35.** Sawyer deliberately omitted to disclose to the viewing audience that the *PrimeTime* "investigators" never asked Moore for the source of the items Pastor Tilton sends his supporters. Moore never told Defendants that he obtained anything for Pastor Tilton from Taiwan. Defendants made it appear that Moore was referring to Pastor Tilton's mailings, when in fact his comment was in response to Anthony's non-televised question:

> I would like to put something inexpensive in a mailing. Could you get something from Taiwan?

**36.** Defendants knew that such a practice by Pastor Tilton, if true, would constitute mail fraud. Sawyer deliberately made the above statements in order to make it appear that Pastor Tilton was committing mail fraud. In fact, all of the Holy Water Pastor Tilton sent in mailings was from the River Jordan. The truth was readily and easily verifiable by the Defendants in the course of their "investigation."

**"Prayer Requests"**

**37.** On *PrimeTime* Defendants also inferred that Pastor Tilton was defrauding the public by claiming to pray over mail-in prayer requests when, according to Sawyer, they were thrown in the trash without Pastor Tilton ever having seen them:

> SAWYER: [voice over] But how much does Tilton really care about the beat-up and the hurting? We kept thinking about something

> the head of the direct mail operation told us, that the mail doesn't go to Tilton. It's forwarded unopened to Tilton's bank in Tulsa. So the bank opens the followers' mail, not to share the agony, but to get the money.
>
> INTERVIEWER: The bank opens the letters that come back in?
>
> Mr. MOORE: That's right. And takes your money and puts it in your account. All we get is the paper document and how much the person gave.[2]
>
> SAWYER: [voice over] And those items that people have prayed over and sent in, believing Robert Tilton would take [touch] them and pray over them too? [Well] If some make [made] it to Tilton, there are thousands that didn't. We found them in the garbage at the bank in the marketing research center. . . . ripped up by the bank [letter processors]. . . . The money probably made it to Tilton. The prayers went in the trash. . . .[3]

The Defendants knew that no prayer requests were thrown in the trash by Pastor Tilton or any person working for Pastor Tilton.

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[2]Sawyer again misuses a statement by Moore. Moore who never receives anything from the Bank for Pastor Tilton was not referring to Pastor Tilton in this response.

[3]The underlined language is language from the first broadcast which is omitted from the second broadcast. The bracketed language is language found only in the second broadcast.

Defendants knew that the prayer requests which *PrimeTime* showed in trash dumpsters were planted there by Defendants' own agents and employees in an attempt to frame Pastor Tilton with the crime of mail fraud. Defendants filmed and televised their manufactured evidence, knowing that they were publishing false statements that would create the belief in the viewer and in governmental criminal investigation agencies that Pastor Tilton was engaged in the crime of mail fraud.

"Haitian Orphanage"

**38.** In an earlier segment of the broadcasts concerning one of the other target ministers, Defendants focused on a Haitian orphanage run by a certain Bob Jones ("Jones") whose name was provided them by Anthony. *PrimeTime* portrayed Jones as a person who would allow any person to use his orphanage and his orphaned children as part of a scheme to defraud the public and the Internal Revenue Service:

> SAWYER (voice-over): And let's say we plan to use the kids to raise a lot of money and wanted to keep 95 percent of it for ourselves. Jones would sign on.
>
> . . .
>
> SAWYER (voice-over): But the law says you can't mislead people about the money you raise and where it goes. Its the kind of thing that put Jim Bakker in jail.
>
> MR. JONES: Jim Bakker, he wouldn't have got into it if he had handled it right, but he didn't - you know, he didn't handle it right.
>
> SAWYER (voice-over): Jones told us the way to "handle it" is send him all the money we raise and he'd find a way to send back to

us what we agree on, a kind of laundering scheme.

INTERVIEWER: Now, when you send it to me, how do I report it to the IRS on there? You send it to me back as what?

MR. JONES: I just put "a refund to help cover costs and expenses."

. . .

SAWYER: [voice-over] We showed Roy Stewart of the FCC what we had learned about [another evangelist]. [interviewing] You can't raise money for one thing and use it for another?

Mr. STEWART: That's fraud over the air. It is a violation to raise money or property, to get money and property on the basis of saying you're going to use it for aid and using it for a different purpose.

SAWYER: So if you do that, that is fraud?

Mr. STEWART: That's fraud, right.

SAWYER: (voice-over) We also showed the tape to Congressman Jake Pickle of Texas, who held hearings in 1987 on the need for stronger monitoring of televangelists.

Rep. JAKE PICKLE, (D), Texas: If you or your network give me that film, I'll see that it's turned over to the Internal Revenue Service and I'll try to get some action on it.

The portion of the program featuring Roy Stewart and Congressman Pickle was omitted from the second broadcast.

**39.** In the segment on Pastor Tilton's support of Haitian orphanages, the Defendants deliberately and maliciously referred to Jones and the fraudulent scheme he described while showing a picture of Jones:

> SAWYER: (voice-over) And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these, his missions around the world. But we traced down every charitable contribution of Tilton we could find [tracked down five of Tilton's so-called missions] and we calculate he spends more in a year on billboards around Dallas than he does on all of these [five] missions combined. And what about this mission, Tilton's orphanage in Haiti. We kept thinking about [Well, remember] Bob Jones and how he [who] told us [for just a few thousand a month we] that you could just fix yourself [put] up a sign and claim an [entire] orphanage[, even if we weren't the only contributor?].
>
> [BROTHER BOB JONES: Just put your name on there, whatever you want.]?

Defendants' source on Jones, Ole Anthony, has testified that Jones had no connection with Pastor Tilton nor his ministry.[4] Yet Sawyer

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[4]Trial transcript at 443, ***Word of Faith World Outreach Center Church, Inc. v. Morales***, 787 F. Supp. 689 (W.D. Tex. 1992), *rev'd* 986 F.2d 962 (5th Cir. 1993).

intentionally made it appear to the viewer that Pastor Tilton was engaged in a scheme like Jones' to defraud members of his church and the Internal Revenue Service. Without pointing out the discrepancy, in the second broadcast Sawyer revised Defendants' claim of tracing "every charitable contribution of Tilton we could find" to tracking down "five of Tilton's so-called missions," a contraction rather than an expansion of the investigation.

**40.** Sawyer then reported that:

> SAWYER: (voice-over) Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no. [So even though his magazine calls it the Robert Tilton Ministries Children's Home, it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage.] [interviewing] So nothing from Robert Tilton here?
>
> HAITIAN OFFICIAL: No.

Since Sawyer knew the real name of the orphanage, which can be clearly heard on her broadcast, she could have contacted it to determine the truth before the first broadcast. If she had she would have discovered that Pastor Tilton and the Church have regularly provided substantial financial support each and every month without exception for years plus numerous substantial additional items of support to the World Harvest Orphanage in Port-au-Prince, Haiti. Instead she chose to contact an unnamed "government official" who, as she explains in the second broadcast, would naturally have no

knowledge that Pastor Tilton supported an orphanage. Defendants intentionally failed to follow-up on information they possessed to learn the truth - the fact that a minister supports an orphanage is not "expose" material; the story Defendants fabricated was far more sensational.

**41.** On or about June 23, 1992, in rebuttal to the first broadcast, Pastor Tilton submitted to Defendants a complete copy of the transcript of the Court proceeding, together with all of the exhibits which were introduced with reference to *PrimeTime*'s first broadcast, in the Church's action against the Attorney General of the State of Texas. [5]

**42.** On July 9, 1992, after having received the factual information proving the accusations made in the November broadcast of *PrimeTime* to be false, Defendants caused those same accusations with some minor changes to be rebroadcast along with the a follow-up segment. That broadcast contains the following statements which are defamatory and/or portray Pastor Tilton in a false light:

> ANNOUNCER:--one of the most popular televangelists in the business, Robert Tilton. Eight months later, are his followers getting the full story? (Followed by film clip of Pastor Tilton's videotape deposition in which he is shaking his head and saying "no.")
>
> . . .
>
> SAWYER: (voice-over) So we decided to take hidden cameras to see what we could learn about Robert Tilton's fund-raising. It led us to the nerve center of his ministry, the company that organizes his direct mail. It's called Response Media.

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[5] *Word of Faith World Outreach Center Church, Inc. v. Morales*, 787 F. Supp. 689 (W.D. Tex. 1992), *rev'd* 986 F.2d 962 (5th Cir. 1993).

JIM MOORE: Bob is doing far better than anyone knows.

SAWYER (voice-over): Jim Moore is president of Response Media. He handles not only Tilton, but a number of big corporate accounts. We told Moore that we were media consultants for this man, Dallas minister Ole Anthony. We asked him to show us how to start a big money ministry like Tilton's.

Mr. MOORE: Give them something free. You know, we ought to mail you the latest copy of "X" and get their name and address. New names is the key, new names. Just think "New names."

SAWYER: (voice-over) We learned that once people give you their names, it's easy to keep them on the hook. You mail them something with a gimmick in it.

SAWYER: (voice-over) Tilton sends out an avalanche of things he asks viewers to send back to him - "miracle prayer cloths" he promises to touch and place upon an altar, cords he says he'll place on a "wall of deliverance," arrows he'll use to take aim at a sufferer's needs, a tracing - place your hand there and he'll put his hand there, too. There's holy water from the River Jordan, 'miracle anointing oil' - though Moore said some of the items come from that holy place, Taiwan.

Mr. MOORE: We get stuff from Taiwan.

SAWYER: (voice-over) The letters accompanying the items are written by ghost writers to pressure followers to write back and make donations, too. Does it work? People send them in by the truckloads. It's a great marketing scheme.

SAWYER: (voice-over) And when the letters arrive, they're

processed so the company knows which fund-raising appeals you can use to squeeze followers for the most donations.

> Mr. MOORE: We take the clients' files and we run them up against demographic information and create a profile of who their people are, how many people have cars that are new-

SAWYER: (voice-over) So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar opportunities.

. . .

SAWYER: (voice-over) And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these, his missions around the world. But we tracked down five of Tilton's so-called missions and we calculate he spends more in a year on billboards around Dallas than he does on these five missions combined.

And what about this mission, Tilton's orphanage in Haiti. Well, remember Bob Jones who told us for just a few thousand a month, we could put up a sign and claim an entire orphanage, even if we weren't the only contributor?

> BROTHER BOB JONES: Put your name on there, whatever you want.
>
> (background voice-over) At the World Harvest Orphanage . . .

SAWYER: (voice-over) So even though his magazine calls it the Robert Tilton Ministries Children's Home, it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage.

. . .

SAWYER: (voice-over) And Tilton's marketing director made it clear, when it comes to money for missions, Tilton is very smart. He's careful not to say what donation goes where so he can avoid, again, how Jim and Tammy got caught.

. . .

FORMER TILTON FRIEND: Robert Tilton as I knew him was practicing to become a salesman. That was his concept of success, was to be-

SAWYER: (voice-over) This man, who wanted anonymity, is just one of several old friends of Robert Tilton who talked to us. He remembers when they were in college, they would use drugs or get drunk and go off to tent revivals as a kind of sport.

FORMER TILTON FRIEND: And we'd be drunk and go down front, fall to our knees, speak in tongues.

SAWYER: (voice-over) Tilton and his friends started developing parodies, so-called "Jesus raps" of their own.

FORMER TILTON FRIEND: "Oh, dear God! Come into this young woman's life! Heal tonight! She has a need to find Christ."

> Rev. TILTON: O God! In the name of Jesus, we believe in prayer! We believe in miracles!

FORMER TILTON FRIEND: I personally thought I was a lot better at it than he was.

. . .

SAWYER: (voice-over) But he never tells followers how he and his friends talked about running preacher scams and cashing in.

FORMER TILTON FRIEND: We said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section, and fly around the country and get rich.

> Rev. TILTON: We sold everything that we had but an old ragged tent and a big old truck and a travel trailer and we headed out to tell people about this gospel of Jesus.

SAWYER: (voice-over) That was 1974, when Tilton started out. And by 1981, he had hit the big time. How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a $1.3 million loan, though Tilton claims he never met the man. And after Tilton got the money, he got a new image, too - a permanent wave for his hair, plastic surgery and, like his good buddy Jim Bakker, a talent for tears on demand.

. . .

SAWYER: (voice-over) And we were there one day with hidden camera when he made it clear the tears of his followers are good for the TV pitch, too.

> Rev. TILTON: But I'm thinking, some of these people crying, you know, the ones with the emotions, the crying, the bending over, the running, and then the crowd shots and all that going on.

. . .

SAWYER: (voice-over) . . . But could this have been the "parsonage," in swank Rancho Santa Fe, California, a multi-million lake view home . . .

Or is this the parsonage, in Fort Lauderdale, Florida . . .

. . .

SAWYER: (voice-over) But how much does Tilton really care about the beat-up and the hurting? We kept thinking about something the head of the direct mail operation told us, that the mail doesn't go to Tilton. It's forwarded unopened to Tilton's bank in Tulsa. So the bank opens the followers' mail, not to share the agony, but to get the money.

INTERVIEWER: The bank opens the letters that come back in?

Mr. MOORE: That's right. And takes your money and puts it in your account. All we get is the paper document and how much the person gave.

SAWYER: (voice-over) And those items that people have prayed over and sent in, believing Robert Tilton would touch them and pray over them too? Well if some made it to Tilton, there are thousands that didn't. We found them in the garbage at the bank in the marketing research center. The "angels of God," the prayer cords, the arrows - this person wanted his aimed at getting a real dad - the tracing where Tilton said he'd place his hand, ripped up by letter processors. We found heart-breaking appeals from followers

and letters like this one. It came with personal photographs for Pastor Bob and a prayerful message. It also came with a $7,000 pledge. The money probably made it to Tilton. The prayers went in the trash.

(on camera) And in a moment, new information on Robert Tilton. We'll tell you what's happened to him since our report first aired.

Follow-up Segment

. . .

SAWYER: (voice-over) But four months later, here is Tilton in a videotaped deposition with the Texas attorney general's office, which they recently released to the press over Tilton's objection. In it, Tilton admits he doesn't really pray over every prayer request at all.

> Rev. TILTON: (deposition) Not all of them are the original prayer request. Some are on a computer print-out with their specific kind of prayer that they want me to pray. So I don't get the actual document of some of them.
>
> ATTORNEY: And what happens to the actual document?
>
> Rev. TILTON: It's thrown away.

SAWYER: (voice-over) And in her deposition, Tilton's wife acknowledged that Tilton's so-called "personal letters" were not handwritten by him.

> ATTORNEY: Is the handwriting on the mail piece, is it actually Mr. Tilton's handwriting?
>
> Mrs. TILTON: No, it is not.

ATTORNEY: Is it part of a graphics program that you have?

Mrs. TILTON: It's one of the artists.

SAWYER: (voice-over) And who answers these letters asking for spiritual guidance, advice, miracles? Not Tilton nor his prayer ministers, but people hired by that data processing center in Tulsa.

ATTORNEY: (deposition) And does Word of Faith specify what kind of training they'll receive?

Mrs. TILTON: No.

. . .

SAWYER: (voice-over) Also after our broadcast, Tilton attacked us for what we said about his missions, the ones he implies are his own, like this one. Here's how he promotes it on his TV show.

ANNOUNCER: And Wings of Mercy, a center sponsored by Robert Tilton Ministries-

SAWYER: (voice-over) The promotion makes you think this is Tilton's center, but listen to his deposition.

ATTORNEY: Know what Wings of Mercy is?

Rev. TILTON: Not really.

SAWYER: (voice-over) No wonder, since PrimeTime has learned that Tilton's contribution to that mission is just $300 a month. And what about something else Tilton said in his deposition? He claims that his contribution to his mission in Guatemala is 100 percent of their needs.

ATTORNEY: - that you were going to provide-

Rev. TILTON: We would be-

ATTORNEY: - 100 percent of the support that they needed to maintain their operation.

SAWYER: (voice-over) So we checked this out. We spoke to the onsite missionary in Guatemala who told us, in fact, Tilton is only a partial sponsor. And the Guatemalan government has gone public to say that Tilton and his promotional material exaggerate his contribution for personal gain, including his claim of a special invitation.

Rev. TILTON: (television broadcast) I've been invited to be in the inauguration, the ball, all the celebrations and-

SAWYER: (voice-over) That's not true, according to the president's spokesman, Fernando Munis.

FERNANDO MUNIS: (through interpreter) No. That the President has invited him to attend the inauguration is by all means false, nor does he have any relation with the government. But we cannot take action against a swindler of this caliber.

. . .

SAWYER: (voice-over) So PrimeTime decided to follow Robert Tilton to India this past March.

Rev. TILTON: Do you want to please God tonight?

SAWYER: (voice-over) Well, there was Tilton, passing the collection plates nightly. If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars, money taken from the people he himself calls "the poorest people on earth."

WORSHIPER: (through interpreter) Tilton said, "Please donate money. Please donate money," so everybody got

disappointed and then everybody whispered, "This is not a crusade, it's a business."

. . .

SAWYER: (voice-over) And Brenda Reynolds also saw something else. She says the ministry sent over boxes and boxes of prayer requests to Tilton's home for him to look at and pray over. But she says he didn't want them in the house.

Ms. REYNOLDS: He had told me to just put them in the garage when they bring them out.

SAWYER: Did you ever try to bring them in the house?

Ms. REYNOLDS: Well, like I say, I did one time.

SAWYER: What happened then?

Ms. REYNOLDS: And from then on, well, he just told me to just put them in the garage and they stayed in the garage and they stacked up and stacked up. And I told him, I said, "Well, that - those are things that you're supposed to be praying over," you know, and he told me, he said, "Well, just take them to the trash. Throw them away."

> Rev. TILTON: I laid on top of those prayer requests so much that the chemicals actually got into my bloodstream.

Ms. REYNOLDS: I know for a fact that he did not pray over them and that I took them to the trash myself. And I will look at them and I would remember thinking to myself, "Boy, if these people only knew, you know, what they were doing."

**FIRST CLAIM FOR RELIEF**

**Libel and Slander**

**43.** Paragraphs 1-42 are incorporated herein by reference.

**44.** The Defendants, and each of them, contrived and intended to injure the Pastor Tilton and deprive him of the respect, confidence and esteem which are purely essential to Pastor Tilton's profession and contrived and intended to deprive Pastor Tilton of his good name, reputation and the esteem of the members of his Church, and to bring him into disastrous scandal, ridicule and professional disrepute, before the members of his Church, his professional associates, friends, neighbors, acquaintances and the public in general, and to hold Pastor Tilton up to public scorn, contempt, hatred, ridicule and disgrace by falsely and wrongfully publishing and circulating of and concerning the Pastor Tilton the statements described above. Those statements were meant and intended to convey that Pastor Tilton was and is guilty of criminal conduct, fraud, fleecing his Church members and guilty of conduct unbecoming a minister of a church and to hold Pastor Tilton in contempt in the eyes of the members of his Church that he represents in his capacity as a Pastor. Hundreds of former followers have condemned Pastor Tilton as a direct result of the libel and slander by the Defendants.

**45.** By reason of the aforesaid publication and its wide circulation in the State of Oklahoma and all the States of the United States and among the people thereof, Pastor Tilton has been greatly injured in his good name, fame and reputation, in the conduct and execution of his duty as the principal pastor of his Church, and pursuance of his profession and calling as a pastor, and his standing in the community wherein he resides, and in the high regard, respect, confidence and esteem he has enjoyed among his associates in the evangelical ministry, as aforesaid

and has suffered a loss of earnings, and seeks damages in excess of the jurisdictional limits of this Court to be proven at time of trial.

**46.** Each of the above-described defamatory statements of and concerning Pastor Tilton exposed Pastor Tilton to public hatred, contempt, ridicule and obloquy, deprived him of public confidence and injured him in his profession. Those defamatory statements were published by Defendants on November 21, 1991, were false and were made by the Defendants deliberately, intentionally, willfully and with actual malice. Defendants knew that each of those statements were false or made those defamatory statements with reckless disregard of whether they were false or not.

**47.** Since Defendants represented in their broadcast that they had conducted an "investigation," Defendants at all times, had within their power the ability to verify the truth or falsity of each of the defamatory statements, yet Defendants wilfully, deliberately and intentionally failed or refused to verify the truth of the defamatory statements.

**48.** At the time the said libel and slander was published of and concerning Pastor Tilton, he was engaged in pursuing his profession and calling as a pastor to his congregation in Dallas and to members of his Church throughout the United States by means of his television ministry. By reason of such publication, a large number of persons who had previously been members of his Church asked that their names be removed from the mailing list and from the Church rolls. In addition, by reason of such publication, the numbers of new members joining the Church substantially decreased. By reason of such publication, television stations that had previously carried Robert Tilton's religious programming refused to do so. As a result of such entities refusing to deal with the Pastor Tilton, his ability to reach current and prospective members of his Church has been impaired and Pastor Tilton has otherwise been greatly injured in his credit and reputation and has suffered great pain and mental

anguish, to Pastor Tilton's damage in an amount in excess of the jurisdictional limits of this Court to be proven at time of trial.

**49.** The Defendants made and/or published the defamatory statements deliberately, intentionally, willfully and with actual malice, for which Pastor Tilton is entitled to exemplary or punitive damages against the Defendants, and each of them, in an amount to be set at trial, to punish each Defendant, and to set an example for others not to repeat or engage in similar conduct.

**SECOND CLAIM FOR RELIEF**

**Libel and Slander**

**50.** Paragraphs 1-42 are incorporated herein by reference.

**51.** The Defendants, and each of them, further contrived and intended to injure the Pastor Tilton and deprive him of the respect, confidence and esteem which are purely essential to Pastor Tilton's profession and contrived and intended to deprive Pastor Tilton of his good name, reputation and the esteem of the members of his Church, and to bring him into disastrous scandal, ridicule and professional disrepute, before the members of his Church, his professional associates, friends, neighbors, acquaintances and the public in general, and to hold Pastor Tilton up to public scorn, contempt, hatred, ridicule and disgrace by falsely and wrongfully republishing and recirculating of and concerning the Pastor Tilton the statements described above. Those statements were meant and intended to convey that Pastor Tilton was and is guilty of criminal conduct, fraud, fleecing his Church members and guilty of conduct unbecoming a minister of a church and to hold Pastor Tilton in contempt in the eyes of the members of his Church that he represents in his capacity as a Pastor. Hundreds of former followers have condemned Pastor Tilton as a direct result of the libel and slander contained in the second broadcast by the Defendants.

52. By reason of the aforesaid publication and its wide circulation in the State of Oklahoma and all the States of the United States and among the people thereof, Pastor Tilton has been greatly injured in his good name, fame and reputation, in the conduct and execution of his duty as the principal pastor of his Church, and pursuance of his profession and calling as a pastor, and his standing in the community wherein he resides, and in the high regard, respect, confidence and esteem he has enjoyed among his associates in the evangelical ministry, as aforesaid and has suffered loss of earnings, and seeks damages in excess of the jurisdictional limits of this Court to be proven at time of trial.

53. The above-described defamatory statements of and concerning Pastor Tilton exposed Pastor Tilton to public hatred, contempt, ridicule and obloquy, deprived him of public confidence and injured him in his profession. Those defamatory statements were republished by Defendants on July 9, 1992, were false and were made by the Defendants deliberately, intentionally, willfully and with actual malice. Defendants knew that each those statements were false or made those defamatory statements with reckless disregard of whether they were false or not.

54. Since Defendants represented in their first broadcast that they had conducted an "investigation" and in their second broadcast that they had conducted a follow-up investigation, Defendants at all times, had within their power the ability to verify the truth or falsity of each of the defamatory statements, yet Defendants wilfully, deliberately and intentionally failed or refused to verify the truth of the defamatory statements.

55. At the time the said libel and slander in the second broadcast was published of and concerning the Pastor Tilton, he was engaged in pursuing his profession and calling as a pastor to his congregation in Dallas and to members of his Church throughout the United States by means of his television ministry. By reason of such

publication and republication, a large number of persons who had previously been members of his Church asked that their names be removed from the mailing list and from the Church rolls. In addition, by reason of such publication and republication, the numbers of new members joining the Church continued to decrease. After the second broadcast, additional television stations that had previously carried Pastor Tilton's religious programming refused to do so. As a result of such entities refusing to deal with the Pastor Tilton, his ability to reach current and prospective members of his Church has been impaired and Pastor Tilton has otherwise been greatly injured in his credit and reputation and has suffered great pain and mental anguish, to Pastor Tilton's damage in an amount in excess of the jurisdictional limits of this Court to be proven at time of trial.

**56.** The Defendants made and/or published the defamatory statements deliberately, intentionally, willfully and with actual malice, for which Pastor Tilton is entitled to exemplary or punitive damages against the Defendants, and each of them, in an amount to be set at trial, to punish each Defendant, and to set an example for others not to repeat or engage in similar conduct.

**THIRD CLAIM FOR RELIEF**

**Equitable Claim for Permanent Injunction**

**57.** Paragraphs 1-13 are incorporated herein by reference.

**58.** Plaintiff Tilton's third claim for relief centers on the potential rebroadcast[6] of the portions of the television tabloid

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[6]On Saturday, July 17, 1993, Mr. Floyd Abrams, principal attorney for all Defendants, stated as reported in the *Tulsa World*:

> Meanwhile, in New York, ABC's attorney, Floyd Abrams, said he had no idea if or when ABC would re-air its shows.

program *PrimeTIME* Live broadcast on November 21, 1991, and July 9, 1992, which are set out in paragraphs 15 and 52 above and are incorporated herein by reference. Those statements are lies concerning Pastor Tilton, false speech concerning Pastor Tilton, and/or false light portrayals concerning Pastor Tilton.

**59.** As a direct result of Defendants' prior broadcasts of the false speech and/or false light (here sought to be enjoined from further rebroadcast), Pastor Tilton's standing in his profession as a man of God has been lessened, and his ability to minister to those seeking God has been impaired. Hundreds of former believers in the message of Pastor Tilton's Church have condemned Pastor Tilton as a direct result of the libel, slander, and false light by Defendants. Each time the program was broadcast, the number of calls from persons viewing Pastor Tilton's television ministry programs and the number of television stations carrying Plaintiff's religious programs dropped dramatically. Defendants' broadcasts have severely interfered with Pastor Tilton's ability to be a minister of the Gospel of Jesus Christ - he lost credibility with his constituents. Since those broadcasts, Pastor Tilton could not communicate his message of Jesus Christ as effectively, could not reach out to as broad an audience, and could not hold the Crusades in India as planned. Such interference with Pastor Tilton's exercise of his religious beliefs and his calling as a minister constitutes an irreparable harm for which money can never compensate. (*See* Transcript of Hearing on Preliminary Injunction, Vol. I, pp. 256-261, Vol. II, pp. 324-367).

**60.** Republication or rebroadcast of the above described false light and/or false speech sought to be enjoined will cause Pastor

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"I don't know the answer. If ABC had wanted to, it could have re-aired them anytime since" the last show ran on July 9, 1992.

Tilton irreparable harm. Rebroadcast by the Defendants of their false speech and/or false light portrayal of Pastor Tilton will have a further chilling effect on his ability to have people accept him as a truthful, Christian minister thus lessening, and in individual cases foreclosing his ability to carry out his mission to save souls.

**61.** Unless restrained by this Court, Defendants will and, as stated by their attorneys, are free to rebroadcast the above described false statements.

**62.** The issuance of a permanent injunction will not interfere with any protected right of the Defendants which is superior in equity to the rights of the Plaintiff and will not cause any loss or injury to any of the Defendants or to the public. Pastor Tilton seeks only to have enjoined the rebroadcast of the above specifically described false speech and/or false light concerning Pastor Tilton.

**FOURTH CLAIM FOR RELIEF**

**False Light Invasion of Privacy**

**63.** Paragraphs 1-42 are incorporated herein by reference.

**64.** The Defendants, and each of them, injured the Plaintiff by publishing and republishing statements of and concerning Plaintiff which invaded his privacy and placed him before the public in a false light which would be highly offensive to a reasonable person. Those false light statements were meant and intended to convey *inter alia* that Pastor Tilton was and is guilty of criminal conduct, association with criminals, fraud, misrepresenting his support of missions and orphanages, soliciting funds for non-existent orphanages, fleecing his Church members and guilty of other conduct unbecoming a minister of a church.

**65.** In both broadcasts Defendants falsely attributed personal associations to Plaintiff which a reasonable person would find were highly offensive. The broadcasts stated or implied that Plaintiff was a close friend of a convicted former televangelist, that

Plaintiff was involved with Bob Jones, a missionary with a money laundering scheme, and that Plaintiff "courted" a man linked to organized crime. Defendants falsely attributed statements to Plaintiff that placed him in a false light, i.e., that Plaintiff was not giving his followers the full story concerning Plaintiff and his ministry. Defendants distorted and/or embellished the truth concerning Plaintiff through misleading photographs, film footage, or through the omission of significant facts to place him in a false light before the public. The statements set forth in paragraphs 15 and 42 contain numerous other false light portrayals of and concerning the Plaintiff.

66. The Defendants published the false light statements on November 21, 1991, and July 9, 1992, with knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the Plaintiff would be placed.

67. As a direct and proximate result of the publications and their wide circulation throughout the United States, Pastor Tilton has suffered great pain, mental anguish and emotional distress and loss of earnings, to Pastor Tilton's damage in an amount in excess of the jurisdictional limits of this Court to be proven at time of trial.

68. Defendants' conduct in making and/or publishing the false light statements was oppressive, fraudulent and malicious, for which Pastor Tilton is entitled to exemplary or punitive damages against the Defendants, and each of them, in an amount to be set at trial, to punish each Defendant, and to set an example for others not to repeat or engage in similar conduct.

**WHEREFORE**, the Plaintiff, Robert G. Tilton, prays that this Court:

(1) Enter judgment in favor of the Plaintiff against the Defendants, Capital Cities/ABC INC., American Broadcasting Companies, Inc., ABC News, Inc., Diane Sawyer, Robbie Gordon and Kelly Sutherland on Plaintiff's First, Second and Third Claims

for Relief for compensatory damages in excess of the jurisdictional requirements of this Court, and for exemplary or punitive damages in an amount to be determined at trial.

(2) Enter a permanent injunction enjoining Defendants, their respective agents, employees and all persons in active concert and participation with them from rebroadcasting in any manner the above described lies, false light and/or false speech concerning Plaintiff.

(3) Award Plaintiff such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of July, 1994, a true and correct copy of the above and foregoing pleading was mailed with proper postage thereon to:

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No. 92-C-1032-BU

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON,
an individual,
Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; AMERICAN BROADCASTING COMPANIES, INC., a Delaware corporation; ABC NEWS, INC., a Delaware corporation; DIANE SAWYER, an individual; ROBBIE GORDON, an individual; and KELLY SUTHERLAND, an individual.
Defendants.

FILED

MAR 28 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

# DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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No. 92-C-1032-BU

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON,
an individual,
Plaintiff,
vs.
CAPITAL CITIES/ABC INC.,
a New York corporation;
AMERICAN BROADCASTING
COMPANIES, INC., a Delaware
corporation; ABC NEWS, INC.,
a Delaware corporation; DIANE
SAWYER, an individual; ROBBIE
GORDON, an individual; and KELLY
SUTHERLAND, an individual.
Defendants.

Defendants (hereinafter referred to as "ABC") respectfully submit this memorandum of law in support of their motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the Final Amended Complaint in this action.

## STATEMENT OF FACTS

Pursuant to N.D. LR 56.1(A), ABC sets forth below its statement of material facts as to which it contends there is no genuine dispute.

### The Broadcasts at Issue

1. On November 21, 1991, ABC broadcast a report entitled "The Apple of God's Eye" on its weekly news program PrimeTime Live ("PrimeTime"). The report (hereinafter "PrimeTime I") focused on -- and was critical of -- plaintiff Robert

Tilton and his ministry ("Tilton"). (Affidavit of Floyd Abrams ("Abrams Aff.") Ex. 1, Ex. V-1)

2. On July 9, 1992, PrimeTime rebroadcast the original report, with certain revisions and clarifications, and broadcast an update reporting on additional information ABC had learned about Tilton in the interim ("PrimeTime II"). (Abrams Aff. Ex. 2, Ex. V-2)

3. Diane Sawyer ("Sawyer") was the anchor and correspondent for the reports; Roberta Gordon ("Gordon") was the producer; and Kelly Sutherland ("Sutherland") was the associate producer. (Affidavit of Diane Sawyer ("Sawyer Aff.") ¶ 1; Affidavit of Roberta Gordon ("Gordon Aff.") ¶ 1; Affidavit of Kelly Sutherland ("Sutherland Aff.") ¶ 1)

The Denial of Preliminary Injunctive Relief

4. In May of 1993, Tilton moved this Court for entry of a temporary restraining order and a preliminary injunction barring ABC from rebroadcasting statements contained in the PrimeTime broadcasts. At that time, Tilton's complaint alleged that the PrimeTime broadcasts contained three false and defamatory passages. The first related to an orphanage Tilton claimed to support in Haiti; the second focused on comments of the president of Tilton's direct mail operation to the effect that "we get stuff from Taiwan"; the third concerned Tilton's failure to pray over items sent to him by followers as he had promised to. Tilton v. Capital Cities/ABC, Inc., 827 F. Supp. 674, 676 (N.D. Okla. 1993).

5. After a five-day evidentiary hearing, this Court (Brett, J.) denied Tilton's request for injunctive relief finding, inter alia, that he had failed to "demonstrate[] that there [was] a substantial likelihood of recovery on the merits regarding the three claimed libels" because Tilton's evidence did not prove falsity or actual malice by clear and convincing evidence. (827 F. Supp. at 681)

6. After his request for preliminary injunctive relief was denied, Tilton moved for and was granted leave to amend his complaint. He did so, significantly expanding his attack on the broadcasts. At the direction of the Court, an July 26, 1994 Tilton filed his Final Amended Complaint (the "Complaint") consolidating all of his claims against defendants in one document. (Abrams Aff. Ex. 3)

The Challenged Statements: Haiti

7. PrimeTime I reported that even though Tilton had publicly used three different names to describe the orphanage he claimed to support in Haiti, government officials there had not heard of Tilton or any of the orphanages he had named. (Abrams Aff. Ex. 1 at 16)

8. PrimeTime I accurately reported that Tilton had used three different names to describe an orphanage he claimed to sponsor in Haiti. The three names used by Tilton were: the Robert Tilton Ministries Children's Home, the Children's Hope Center and the World Harvest Orphanage. (Gordon Aff. ¶ 61; Sutherland Aff. ¶¶ 12 & 16 & Exs. 3 & 4)

9. PrimeTime I accurately reported that the Haitian government officials interviewed by ABC had not heard of any of Tilton's orphanages. (Abrams Aff. Ex. 1 at 16; Sutherland Aff. ¶¶ 23, 24 & 30; Sawyer Aff. ¶ 21)

10. Judge Brett concluded that ABC had in fact made "a reasonable effort to locate the Haitian orphanage with which the Tilton Ministries was associated and supported" but was unable to do so. (827 F. Supp. at 681) That conclusion was and is correct.

11. PrimeTime II accurately reported that even though Tilton had referred to the orphanage in Haiti as the "Robert Tilton Ministries Children's Home," it was not really Tilton's orphanage. (Abrams Aff. Ex. 2 at 13, Ex. 6 at 413, Ex. 7 at 365-66)

12. PrimeTime II accurately reported that Haitian government officials spoken to by ABC had not heard of Tilton or his orphanage. (Abrams Aff. Ex. 2 at 13; Sawyer Aff. ¶ 21; Sutherland Aff. ¶¶ 23, 24, & 30)

13. Both PrimeTime I and PrimeTime II reported that a canvas sign on the Haitian orphanage featured in Tilton's magazines brought to mind the statements of Bob Jones, broadcast earlier, that for a few thousand dollars a month one "could put up a sign and claim an entire orphanage" in Haiti even if one "w[as]n't the only contributor." (Abrams Aff. Ex. 1 at 16 & Ex. 2 at 13)

14. Tilton contributed $1200 a month to an orphanage in Haiti to which he was not the only contributor. (Gordon Aff. ¶¶ 60 & 112; Abrams Aff. Ex. 8 at 178-79)

15. The canvas sign on the Haitian orphanage featured in Tilton's magazine and in a film produced by him was hung on the orphanage only once and only then for the purpose of photographing it for Tilton. (Abrams Aff. Ex. 17 at 108-09)

The Challenged Statements: Items from Taiwan

16. On both PrimeTime I and PrimeTime II, Sawyer, after referring to an interview ABC had conducted at Response Media, Inc. ("Response Media") and after disclosing to viewers that ABC obtained access to Response Media by telling its president, Jim Moore, "that we were media consultants for this man, Dallas minister Ole Anthony," stated:

> "Tilton sends out an avalanche of things he asks viewers to send back to him -- 'miracle prayer cloths' he promises to touch and place upon an altar, cords he says he'll place on a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing -- place your hand there and he'll put his hand there, too. There's holy water from the River

> Jordan, 'miracle anointing oil' -- though Moore said some of the items come from that holy place, Taiwan." (Abrams Aff. Ex. 1 at 15-16 & Ex. 2 at 12)

17. Tilton does not dispute that before PrimeTime I and PrimeTime II were broadcast he sent out a multitude of items in his mailings to his prayer partners, including "miracle prayer cloths" he promised to touch and place upon an altar, cords he said he would place upon a wall of deliverance, arrows he said he would aim at a sufferer's needs, and a tracing he urged partners to touch and promised that he would touch too. (827 F. Supp. at 676-77; Abrams Aff. Ex. 5 at 5)

18. In the course of the tour provided by Moore to Gordon and Anthony at Response Media, they passed wall displays of materials used by Tilton in his fund-raising efforts which included a display containing a button which Tilton had mailed to his followers. (827 F. Supp. at 677; Gordon Aff. ¶ 29)

19. Almost immediately after passing the Tilton wall displays, Gordon asked Moore: "Where do you get all this stuff from?" When Moore responded by asking, "What do you mean?" Gordon stated, referring back to the Tilton display they had just passed, "Well, I, you know, like the button I just saw and you have like water." (Id.)

20. In what Gordon understood to be an answer to her questions, Moore responded, "Oh, we have, -- we've been doing this for so long, that we, we get it down to a science." When Gordon responded by asking if Response Media had "storehouses", Moore replied by saying, "We get stuff from Taiwan." (Id.)

21. After viewing the tape of this exchange with Gordon at the preliminary injunction hearing in this case, Moore conceded that it was "possible" that Gordon understood his response about

Taiwan to respond to Gordon's direct inquiry about where he got "all this stuff from." (Abrams Aff. Ex. 13 at 905-06)

22. Gordon understood Moore's answer about Taiwan to be a response to the question about where he got "all this stuff from" including the Tilton button to which she had specifically referred. As a result, the broadcast ironically observed that "some of the items come from that holy place, Taiwan." (Gordon Aff. ¶¶ 29 & 32)

23. The broadcast did not say that the "holy water" came from Taiwan. It said that "some of the items" mailed to "partners" by Tilton came from that "'holy place Taiwan'." (827 F. Supp. at 677)

24. ABC believed that Moore was speaking accurately with respect to Taiwan being a source of "some of the items" furnished by Tilton to his followers. ABC had no reason to doubt that information and did not do so. (Gordon Aff. ¶ 32)

25. Judge Brett found that "Gordon reasonably could have concluded from Moore's general reference to Taiwan that some of the items Tilton mailed out may have come from Taiwan, i.e., buttons, cloth, cords, etc." (827 F. Supp. at 677)

26. In fact, Response Media did obtain inexpensive items for Tilton mailings from, among other places, Hong Kong. (Abrams Aff. Ex. 14 at 233-37)

The Challenged Statements: Items That People Have Prayed Over and Sent to Tilton

27. Towards the conclusion of PrimeTime I and PrimeTime II, in generally similar language, Sawyer stated the following:

> "And those items that people have prayed over and sent in, believing Robert Tilton would touch them

> and pray over them too? Well, if some made it to Tilton there are thousands that didn't. We found them in the garbage at the bank and the marketing research center. The 'angels of god,' the prayer cords, the arrow -- this person wanted his aimed at getting a real dad -- the tracing where Tilton said he'd place his hand, ripped up by letter processors. We found heart-breaking appeals from followers and letters like this one. It came with a $7,000 pledge. The money probably made it to Tilton. The prayers went in the trash." (Abrams Aff. Ex. 1 at 19 & Ex. 2 at 15)

28. In the course of her research for the broadcast, Gordon met and received the assistance of Ole Anthony, a Dallas minister, who has been critical of "big money TV preachers" including Tilton. (Gordon Aff. ¶ 16)

29. In the fall of 1991, after Gordon and Anthony toured Response Media and learned of the existence of Commercial Bank and Trust Company in Tulsa ("Commercial Bank and Trust"), Anthony told Gordon that he and two of his colleagues, Powell Holloway and Harry Guetzlaff, intended to look through the trash outside Commercial Bank and Trust. Subsequently, Anthony told Gordon and Sutherland that he and his colleagues had examined trash outside Commercial Bank and Trust, IDM and the law offices of J.C. Joyce, counsel and advisor to Tilton. Anthony reported to Gordon that he and his colleagues had discovered thousands of items in the trash that partners had sent to Tilton to pray over. (Gordon Aff. ¶ 46)

30. Both Gordon and Sutherland, on different occasions, inspected trash which Anthony said he had found during his "trash trips." Both believed that Anthony accurately reported what he and

his colleagues had found in the trash. (Gordon Aff. ¶¶ 43, 44 & 47; Sutherland Aff. ¶ 11)

31. After the November 21, 1991 broadcast, ABC received additional information with respect to Tilton's handling of mail and other items sent to Tilton by followers. In November 1991, Tilton had stated on television:

> "I lay my hands, personally, on every prayer request that comes in through the phone center, or comes in through the mail, or comes in through our response pieces of paper that you[] write your prayer request on." (Gordon Aff. ¶ 89)

However, in a videotaped deposition later taken by the Texas attorney general's office which ABC obtained, Tilton admitted that he did not lay his hands "on every prayer request that comes in" but on computer printouts that purportedly summarized certain prayers. At his deposition, Tilton said that:

> "Not all of them are the original prayer requests. Some are on a computer print-out with their specific kind of prayer that they want me to pray. So I don't get the actual document of some of them." (Gordon Aff. ¶ 105)

32. Tilton did not lay his hands personally on every prayer request that came in either to the phone ministry or through the mail. (Abrams Aff. Ex. 6 at 370-76, Ex. 7 at 211-18)

33. Shortly after the November 21, 1991 broadcast, ABC also learned that substantial numbers of prayer requests directed to Tilton and other materials sent to him by followers had been found at a Tulsa recycling company. (Gordon Aff. ¶ 93) At the same time, ABC also learned that for a number of years, prior to and including 1991, that recycling center had received approximately one ton per week of paper from IDM. Included in the tons of IDM trash were

prayer requests, "holy water," prayer cloths, "Sands of Jerusalem," and the like. (Abrams Aff. Ex. 10 at 702-05)

34. After the November 21, 1991 broadcast, Sutherland learned that Tilton's former employee, Brenda Reynolds, was willing to be interviewed about Tilton's behavior regarding prayer requests sent to him. As reported by Sawyer, based upon her lengthy interview with Ms. Reynolds, PrimeTime II stated:

> "SAWYER: And Brenda Reynolds also saw something else. She says the ministry sent over boxes and boxes of prayer requests to Tilton's home for him to look at and pray over. But she says he didn't want them in the house.
>
> MS. REYNOLDS: He had told me to just put them in the garage when they bring them out.
>
> SAWYER: Did you ever try to bring them in the house?
>
> MS. REYNOLDS: Well, like I say, I did one time.
>
> SAWYER: What happened then?
>
> MS. REYNOLDS: And from then on, well, he just told me to just put them in the garage and they stayed in the garage and they stacked up and stacked up. And I told him, I said, 'Well, that -- those are things that you're supposed to be praying over,' you know, and he told me, he said, 'Well, just take them to the trash. Throw them away.'
>
> REV. TILTON: I laid on top of those prayer requests so much that the chemicals actually got into my bloodstream.
>
> MS. REYNOLDS: I know for a fact that he did not pray over them and that I took them to the trash

myself. And I will look at them and I would remember thinking myself, 'Boy, if these people only knew, you know, what they were doing.'" (Abrams Aff. Ex. 2)

35. Tilton's "prayer partners" are told by him to send their prayers to his Church in Dallas. According to Tilton, none of that mail is actually opened or read by him upon its arrival in Dallas. Instead, it is immediately forwarded by the postal service to Commercial Bank & Trust in Tulsa. At Commercial Bank & Trust, Tilton claims, all money sent by his followers is removed and deposited in the Church's account. Tilton claims that all other contents are forwarded to IDM and that the mail is then read by IDM employees who send a response chosen by them to the prayer partner. According to Tilton, prayer requests are then forwarded to him to be prayed over. (Abrams Aff. Ex. 6 at 560-61)

36. The first letter forwarded to individuals who respond in writing or by telephone to Tilton's appearances on television is referred to by Tilton as the "Prayer of Agreement Miracle Campaign" mailing, and is known in Tilton's organization as the "P-21" mailing. In this mailing, Tilton agrees to pray in agreement with his new partner for 21 days. Specifically, IDM forwards three documents on which the partners are asked to write their prayers to Tilton on days 1, 8 and 15 of the 21-day period. Self-addressed envelopes addressed to Tilton at a post office box in Dallas are enclosed for the prayer requests. (Abrams Aff. ¶¶ 23 & Ex. 19)

37. Pursuant to a policy decision of Tilton's Church reflected in official instructions sent to IDM, IDM was instructed "to keep" in Tulsa and not forward to Tilton in Dallas all prayers sent to Tilton on the forms provided by Tilton for the 8th and 15th days (forms referred to as P-21B and P-21C, respectively). As a result, at the time of the broadcasts at issue and up to the time of the preliminary injunction hearing in this case, IDM did not forward <u>any</u>

P-21Bs and P-21Cs from Tulsa to Dallas, and Tilton never saw, touched, laid his hands on or prayed over them. (Abrams Aff. Ex. 6 at 377-81)

38. P-21Bs and P-21Cs contain a form on which partners are instructed to write their "needs in . . . life" as a "prayer of agreement miracle request." For example, one prayer partner, Robin Lester, wrote on a P-21B form found in the trash in Tulsa:

> "My 5 month old son and myself both have the H.I.V. (A.I.D.S.) virus. Bob, could you please pray to God with us for my miracle that God will heal us. I pledged a $100.00 vow on 4-19-91. I have only been able to pay on it twice because me and my husband are on a fixed income. I watch your show every day. I also read my Bible and pray every day." (Abrams Aff. ¶ 32 & Ex. 20)

Another, Heather Reagan, wrote on a P-21B form found in the trash in Tulsa:

> "Help for my 10 year old daughter. The love and happiness that I've been praying about for many months. The strength to go on from day to day. Financial security. Help me not feel like my heart could just break from lack of love and respect from many people in my life." (Abrams Aff. ¶ 28 & Ex. 20)

39. Tilton admits that he does not pray over any P-21B and P-21C prayer requests. (Abrams Aff. Ex. 6 at 374-76, Ex. 7 at 153)

40. A total of 127,913 P-21B prayer responses were sent to Tilton by his followers between the time P-21 was first sent to prospective partners in June 1988 and November 19, 1991. A total of $2,576,989.46 was enclosed with the P-21Bs. (Abrams Aff. ¶ 34)

41. A total of 97,728 P-21C responses were sent to Tilton by his followers between June 1988 and October 15, 1991. A total of $2,178,058.83 was enclosed with the P-21Cs. (Id.)

42. According to the testimony of Michael Conners, the President of IDM, of the P-21B and P-21C responses sent to Tilton, between 10% and 30% may not have contained prayer requests. (Abrams Aff. Ex. 10 at 745) Assuming a 20% figure, a total of 180,512 P-21B and P-21C prayer requests (80% of the total 225,641) were initially mailed by partners to Tilton in Dallas, sent to Tulsa immediately upon arrival in Dallas and ultimately disposed of in Tulsa without Tilton ever having seen, touched, laid hands on or prayed over them. (Abrams Aff. ¶ 34; Ex. 6 at 566-71)

43. In addition to the P-21B and P-21C prayer requests that never reached Tilton in Dallas and that were routinely thrown in the trash in Tulsa, many other requests for prayer sent by Tilton's partners to him in Dallas were sent, on receipt, to Tulsa, where they were eventually trashed without ever having been read, touched or prayed over by Tilton. For example, tens of thousands of handwritten letters (referred to by Tilton as "white mail") containing prayer requests are sent to Tilton every year in envelopes other than those provided by him. According to Tilton, the prayer requests in these letter are summarized in computer printouts over which he prays. (Abrams Aff. Ex. 7 at 174-79) But notwithstanding his statement that he "lays his hands personally on every prayer request that comes in . . . through the mail," Tilton acknowledges that he does not personally read or touch these prayers. (Abrams Aff. Ex. 6 at 571-72)

44. Tilton's ministry provided written instructions to IDM as to how to handle responses from Tilton's partners to particular mailings. (Abrams Aff. ¶ 37) These instructions were followed by the IDM employees responsible for implementing the policies of the ministry. (Id.) As reports a number of mailings, IDM

was instructed not to return materials to Tilton that he had promised his partners that he would either pray over or otherwise use in some religious manner. (Id. at ¶¶ 38-39)

45. For example, in one mailing, the March 1, 1990 M75 "Cornmeal" mailing, Tilton promised that he would "lay his hand on your prayer request." Nevertheless, for this mailing Tilton's instructions to IDM directed IDM to keep the "entire device" returned by the prayer partner (including that portion containing partners' prayer requests). None of those prayer requests were sent to Tilton by IDM for him to pray over. As of November 19, 1991, 23,825 responses to the M75 mailing had been sent by Tilton's prayer partners to him; Tilton did not lay his hands on or pray over any of them. (Abrams Aff. ¶ 38)

46. Similarly, in the September 1, 1990 M81 "Rope" mailing, Tilton promised that he would "lay his hands on your prayer request." Nevertheless, for this mailing, Tilton's instructions directed IDM to keep the "entire prayer" device returned by the prayer partner (including that portion containing partners' prayer requests). None of those requests ever were sent to Tilton by IDM to pray over. As of November 19, 1991, 14,268 responses to the M81 mailing had been sent by Tilton's prayer partners to him; Tilton did not lay his hands on or pray over any of them. (Abrams Aff. ¶ 39)

Other Challenged Statements: Phone Ministers

47. PrimeTime I reported:

> "Bill Hardy: I thought I was coming here to really help people and to minister to their needs and --
>
> Diane Sawyer: [voice over] Bill Hardy left the Tilton ministry after two years as a telephone prayer minister taking calls from desperate followers.
>
> Bill Hardy: In July of 1989, a computer was installed to keep track of our times and so we had to

basically be off the line in seven minutes.

Diane Sawyer: [voice-over] Hardy showed us the phone scripts which directed ministers to get a minimum vow of $100 from each caller.

Bill Hardy: We truly became the McDonald's of ministry. We were selling our ministry for money.

Diane Sawyer: [voice over] And if Hardy felt he was taking advantage of the callers, imagine how this woman felt, Elizabeth Montcalm, a temporary employee at AT&T. When Tilton went to Israel last year, she and others at AT&T were asked to pose as Tilton prayer ministers.

Elizabeth Montcalm: I got people calling about their sons being on drugs or alcoholics or husbands being an -- an alcoholic. I mean, people are telling you their most intimate secrets, their personal stuff about themselves. And here I am, you know, just a temporary employee from AT&T." (Abrams Aff. Ex. 1 at 18)

48. The only portion of this passage challenged by Tilton is the sentence underscored above. (Abrams Aff. Ex. 5 at 24)

49. When Tilton broadcast from Israel in September 1990, he urged viewers to phone in their prayer requests to "prayer ministers" standing by at a "miracle prayer center" in Dallas. (Abrams Aff. ¶ 43)

50. Tilton and/or his Church had retained AT&T to answer calls from prayer partners during his telecast from Israel. Some of those calls were answered by Elizabeth Montcalm, a temporary AT&T employee, in Florida. (Sawyer Aff. ¶ 13)

51. Tilton and/or his Church had instructed the AT&T workers, including Elizabeth Montcalm, among other things, to answer telephone calls by saying, "Thank you for calling Success-N-Life Ministry" and to tell "rambling" callers, "Your miracle will come as you pray with Pastor Bob the Prayer of Agreement." (Sawyer Aff. ¶ 13)

52. Ms. Montcalm told ABC that when she was answering phone calls for "Success-N-Life" during Tilton's Israel Crusade, callers told her intimate details of their lives, apparently believing that they were speaking to prayer ministers. (Sawyer Aff. Ex. 14)

53. Tilton admits that he does not believe anything Elizabeth Montcalm said on the broadcasts was untrue. (Abrams Aff. Ex. 7 at 399)

Other Challenged Statements: Tilton's College Days

34. Both PrimeTime I and PrimeTime II contained a passage reporting on Tilton's college days and included portions of an interview with John Michael Taylor, a former college friend of Tilton's. Taylor told Gordon that while in college Tilton and the rest of his group would often get drunk, imitate preachers and attend tent revival meetings as a kind of sport. Taylor also told Gordon that Tilton and his group would often joke that when they graduated "we would buy a good tent, a dynamite sound system, a good amen section and fly around the country and get rich." (Gordon Aff. ¶¶ 69, 70 & 75)

55. Tilton has admitted that he often got drunk and used drugs in college. (Abrams Aff. Ex. 7 at 12-17)

56. Before he was saved, Tilton sometimes imitated preachers when drinking. (Gordon Aff. Ex. 18)

57. Taylor told Gordon that, although he could not swear to the particular time and place, on more than one occasion Tilton

went to and was present with the group of friends at tent revival meetings. (Gordon Aff. Ex. 18)

58. Taylor also told Gordon that he and Tilton used to joke that if "after we graduated that we had a hard time making a living, or if we weren't making the kind of money that we wanted to, that what we should do, would be to grab an audience, become a revival preacher. And through that means, we'd be able to get rich." (Gordon Aff. ¶ 75)

59. Gordon believed what Taylor told her. She also confirmed his recollection with others. (Gordon Aff. ¶¶ 65, 71)

Other Challenged Statements: Tilton's Start

60. Both PrimeTime I and PrimeTime II reported that it was in 1974, after he was saved, that Tilton started out. The broadcasts then stated:

> "Diane Sawyer: [voice-over] And by 1981, he had hit the big time. How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a $1.3 million loan, though Tilton claims he never met the man. And after Tilton got the money, he got a new image too: a permanent wave for his hair, plastic surgery and, like his good buddy Jim Bakker, a talent for tears on demand." (Abrams Aff. Ex. 1 at 17, Ex. 2 at 14)

61. In the course of her research, Gordon received and reviewed an August 29, 1976 article from the Dallas Morning News which reported that Herman Beebe had links to organized crime. (Gordon Aff. ¶ 78) Tilton has admitted that, in fact, Beebe was involved with organized crime. (Abrams Aff. Ex. 7 at 439) Beebe has twice been convicted of fraud. (Abrams Aff. ¶ 53-54)

62. In the early 1980s Tilton's Church had been unsuccessful in its efforts to obtain a loan. Tilton flew to Shreveport, Louisiana and met with Herman Beebe. On Tilton's return trip, with Beebe on Beebe's private jet, Beebe indicated that he would loan the Church $1.3 million. (Abrams Aff. Ex. 7 at 439-41)

63. Tilton has admitted that it was very difficult to get the loan from Beebe and that even after Beebe had indicated he would make the loan Tilton had to make numerous phone calls before he finally receiving an initial disbursement of approximately $100,000. (Abrams Aff. Ex. 7 at 440-41, 447-49) Eventually, Tilton did receive the full proceeds of the loan from Beebe's insurance company. The loan documents were executed in or about April 1980. (Abrams Aff. ¶ 47) Several years later, Tilton asked Beebe for another loan for his "parsonage," but Beebe denied that request. (Abrams Aff. Ex. 7 at 445-46)

64. A May 3, 1987 article about Beebe in the Dallas Morning News reported that Beebe had loaned money to Tilton's Church and that "Tilton declined to be interviewed, but said through a spokeswoman that he never met Beebe." (Gordon Aff. ¶ 76) ABC obtained and reviewed this article as part of its research on the Tilton story and confirmed the details about Tilton's spokeswoman with the Dallas Morning News. (Gordon Aff. ¶ 77)

65. After 1980, Tilton had cosmetic plastic surgery. (Abrams Aff. Ex. 7 at 377-79) After 1980, Tilton also got a permanent wave for his hair. (Abrams Aff. Ex. 7 at 582)

66. Tilton is a friend of Jim Bakker. (Abrams Aff. ¶¶ 55-58) During difficult times in Tilton's ministry, Bakker called and encouraged him. (Abrams Aff. ¶ 57). Before and after Bakker was criminally convicted, Tilton, his wife and his Church gave Bakker and his ministry gifts of thousands of dollars. (Abrams Aff. ¶ 58)

67. During the course of her research, Gordon learned from a former Tilton orchestra member that Tilton could become "emotional" at the drop of a hat. (Gordon Aff. ¶ 81) Gordon herself observed on Tilton's broadcasts what she believed to be Tilton's "talent for tears an demand." (Gordon Aff. ¶ 81)

Other Challenged Statements: Lavish Lifestyle

68. One theme of the PrimeTime broadcasts was that plaintiff was fond of money and the material things in life. (Abrams Aff. Ex. 1 at 14-15, 18-19, Ex. 2 at 11, 14-18)

69. Tilton lived for two years in a home in Rancho Santa Fe, California, with a pool, Jacuzzi, hundreds of thousands of dollars in furnishings and a four-car garage for the Tiltons' two Mercedes. The house (referred to by Tilton as a "parsonage") was purchased by the Church for $1.7 million. As of February 15, 1991, the Church had received an offer in excess of $5 million to purchase the house. Based upon that offer and estimates by real estate professionals, the Church was hopeful that the house could be sold for over $5 million. (Abrams Aff. ¶¶ 64-69)

70. A May 27, 1990 Dallas Morning News article quoted Tilton's attorney, J.C. Joyce, as saying that Tilton's California residence "may be worth as much as $4.5 million." (Gordon Aff. Ex. 86) As reflected in a sales brochure obtained by ABC, the house was placed on the market for $4.3 million. (Sutherland Aff. ¶ 35)

71. Tilton purchased a home in Fort Lauderdale, Florida for $625,000 and purchased a 37-foot boat there for $135,000. (Abrams Aff. Ex. 7 at 226-27)

72. A home in Texas in which Tilton lived (also referred to by him as a "parsonage"), which was owned by the Church, was sold in 1994 for $925,000. (Abrams Aff. Ex. 7 at 56-57)

73. Another home for Tilton, also purchased by the Church (and also referred to by Tilton as a "parsonage"), is presently

under construction and is estimated by Tilton to cost between $650,000 and $750,000. (Abrams Aff. Ex. 7 at 56)

74. Mrs. Tilton had jewelry and furs purchased for more than $108,000. (Abrams Aff. Ex. 9 at 52 & Ex. 61)

75. Tilton told his followers he received a salary set by the Church's board of directors and a parsonage. He did not tell them that the board of directors, in its entirety, was composed of Tilton, his wife and his secretary, or that his "parsonage" was a multi-million dollar house filled with hundreds of thousands of dollars worth of furniture. (Abrams Aff. ¶¶ 64-65; Ex. V-3)

76. The combined salaries of Robert and Marte were $1.5 million in 1991. (Abrams Aff. ¶ 62)

77. The Church's board of directors (consisting of Tilton, his wife and his secretary) determined to pay Robert Tilton alone $1.5 million in 1991. (Abrams Aff. ¶ 62)

78. Tilton never told his followers on television or in Church how much money he or his wife were making, the value of the "parsonages" purchased for his use by his Church, the amount paid by the Church to furnish those houses, the amount paid by him for his house and boat in Florida or the value of Marte Tilton's jewels and furs. (Abrams Aff. Ex. 7 at 543-48)

Other Challenged Statements: Response Media

79. During the interview at Response Media referred to in paragraph 17, supra, Jim Moore, president of Response Media, described a wide range of direct mail services Response Media provides to its clients, including devising direct mail strategies, analyzing the success of different mailings, and performing demographic analysis. Moore indicated in the interview that he had performed such services for Tilton.

80. In the interview, Moore claimed credit for Tilton's financial success. (Gordon Aff. ¶¶ 26)

81. In the interview, Moore claimed that he was doing "media buying" for Tilton "out of [Response Media's] downtown office." (Id.)

82. In the interview, Moore claimed that Response Media shipped prayer requests to Tilton for him to pray over. (Id.)

83. Moore regularly participated in meetings at which Tilton and others analyzed the success of prior mailings and designed new mailings. (Abrams Aff. Ex. 14 at 65-77)

84. Moore served as a consultant to Tilton's Church, helping to design the contents and packaging of the Church's mailings. (Abrams Aff. Ex. 14 at 79-81)

85. On at least one occasion, Response Media prepared a demographic analysis for Tilton's Church, profiling the Church's mailing lists by age, race, income, value of residences and cars owned. (Abrams Aff. Ex. 14 at 135-36)

Other Challenged Statements: Missions and Crusades

86. In 1991, Tilton's Church spent more on billboards around Dallas than it did on the five missions shown in the PrimeTime reports combined: Wings of Mercy, Canaan Land Boys Home, the Philippines, Costa Rica, and Guatemala. (Abrams Aff. ¶¶ 79-88)

87. In his deposition in Tilton v. Morales, Tilton was asked if he knew what Wings of Mercy was and he answered "[n]ot really." (Gordon Aff. Ex. 30 at 162-63)

88. Tilton contributed $300 per month to Wings of Mercy. (Abrams Aff. Ex. 6 at 594)

89. Tilton claimed to be a 100% sponsor of a mission in Guatemala. (Gordon Aff. ¶ 97)

90. Tilton was not the 100% sponsor of any mission in Guatemala. During 1991 and part of 1992, the Guatemalan mission to which Tilton contributed received at least $2,200 per month that did not come from Tilton. (Abrams Aff. Ex. 15 at 34)

91. Tilton's ministry magazine reported:

> "The influence of Robert Tilton Ministries in Guatemala has not gone unnoticed. The government is so appreciative of its contribution to the Guatemalan people, it sent Bob Tilton an official invitation last January to attend the inauguration ceremony of the new president, Jorge Serrano." (Sutherland Aff. Ex. 19)

92. Prior to the broadcast of PrimeTime II, the President of Guatemala and head of the Guatemalan government informed ABC through his spokesman that the President did not know who Tilton was or what he did and that neither he nor his government had invited Tilton to the inauguration. The spokesman, Fernando Muniz, referred to Tilton as a "swindler." (Sutherland Aff. ¶ 46)

93. The Guatemalan government was not appreciative of or even knowledgeable about any contribution of Tilton to the Guatemalan people. Tilton was not invited to the inauguration by the Guatemalan government. (Abrams Aff. Ex. 16 at 23-26, 63-67)

94. ABC obtained its information concerning Tilton's crusade in India that was shown on PrimeTime II from J.N. Sharma, a journalist living in India who worked as an independent contractor for ABC News Intercontinental, Inc. (Declaration of J.N. Sharma ("Sharma Dec.") ¶ 1)

95. The crusade in India that was shown on PrimeTime II was called the Robert Tilton India Crusade and the Robert Tilton Miracle Festival 1992. (Sharma Dec. ¶¶ 2 & 3)

96. Mr. Sharma reported to ABC that collections were taken from the crowds attending the India crusade at the same time Tilton was on the stage. (Sharma Dec. ¶ 5)

Absence of Actual Malice

97. Tilton declined repeated requests by ABC for an interview. (Sawyer Aff. ¶¶ 38, 49; Sawyer Aff. ¶¶ 15 & 17)

98. At the time of its reports, ABC believed that everything reported in PrimeTime I and PrimeTime II was true and had no doubts as to its truth. (Affidavit of Richard Kaplan ("Kaplan Aff.") ¶ 15; Sawyer Aff. ¶ 26 & 31; Gordon Aff. ¶ 117; Sutherland Aff. ¶¶ 39 & 50)

## ARGUMENT

### I. THE LAW GOVERNING THIS MOTION

#### A. The Legal Burdens Imposed on a Public Figure Plaintiff

Tilton acknowledges that he is a public figure. (Complaint ¶ 17) Accordingly, in order to prevail on his libel claim, Tilton must prove, among other things,

1. that a defamatory statement published about him was false; and

2. that the defamatory falsehood was made with "actual malice" -- made with knowledge that it was false, or with reckless disregard of whether it was false or not.

Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587, 590-91 (Okla.), cert. denied, 459 U.S. 923 (1982).[1] This motion focuses

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[1]In addition to his libel claims, Tilton asserts a claim of false light invasion of privacy. (Abrams Aff. Ex. 3, ¶¶ 63-68) Like libel, this tort requires proof that the challenged statements were false. See Polin v. Jews For Jesus, 944 F.2d 911, 1991

on Tilton's inability to meet his burden of proving either of those elements by clear and convincing evidence.

1. The Nature of Tilton's Burden of Proving Falsity

Tilton bears the burden of proving by clear and convincing evidence the falsity of the statements he challenges in his Complaint. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-78 (1986); Tilton v. Capital Cities/ABC Inc., 827 F.Supp. at 681; Miskovsky v. Oklahoma Publishing Co., supra, 654 P.2d at 590-91.[2]

Under the Supreme Court's decisions in Hepps and Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), the First Amendment requires -- in a case like this one involving a media

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WL 184101, at *4 (10th Cir. 1991) (text on WESTLAW) (pursuant to the rules of the 10th Circuit, a copy is attached hereto); Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983). Similarly, the actual malice standard applies to false light claims. See Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967); Colbert v. World Publishing Co., 747 P.2d 286, 291 (Okla. 1987) Jordan v. World Publishing Co., 872 P.2d 946, 948 (Okla. Ct. App. 1994). Accordingly, the discussion in the text concerning Tilton's inability to prove these elements applies to -- and requires dismissal of -- his false light claim as well.

Tilton also asserts an "equitable claim for permanent injunction" in which he seeks to enjoin future rebroadcast of allegedly false speech in the PrimeTime reports. (Abrams Aff. Ex. 3, ¶¶ 57-62) There is no such cause of action. See Schmoldt v. Oakley, 390 P.2d 882, 886 (Okla. 1964); Haick v. Bill Mowbray Motors, Inc., 647 S.W.2d 253, 255 (Tex. 1983) (per curiam).

[2]Plaintiff has previously suggested that Oklahoma law places the burden of proving truth on defendants. Such an interpretation of Oklahoma law is not permitted under the Supreme Court's decision in Hepps. In Hepps, Pennsylvania law had placed the burden of proving truth on the defendant. The Supreme Court held that this result is barred by the First Amendment; the burden of proving falsity must rest on the plaintiff. Hepps, 475 U.S. at 776-78. In denying Tilton's motion for a preliminary injunction, Judge Brett held that Tilton bears the burden of proving falsity by clear and convincing evidence. 827 F. Supp. at 681.

defendant reporting about matters of public concern -- that a statement "must be provable as false before there can be liability under state defamation law." Milkovich, supra, 497 U.S. at 19-20; see also Hepps, supra, 475 U.S. at 775. "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." Milkovich, supra, 497 U.S. at 20; see also Miskovsky v. Oklahoma Publishing, supra, 654 P.2d at 593 (opinion or "judgmental statement in which the maker of the same expresses his views" cannot be libelous); Miskovsky v. Tulsa Tribune Co., 678 P.2d 242, 247 (Okla. 1983), cert. denied, 465 U.S. 1006 (1984).[3]

Tilton cannot satisfy his burden of proving falsity by pointing to minor inaccuracies in the broadcasts. Rather, he must show that the challenged statements were not "substantially true." As the Supreme Court explained in Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991), it is the "'substance, the gist, the sting'" of an allegedly defamatory statement that is critical to the court's analysis. The law of libel purposefully "overlooks minor inaccuracies and concentrates upon substantial truth" precisely because libel law exists to protect against injury to reputation, not to correct every inaccuracy as such. Id. at 516-17. Thus, in order to prevail, Tilton must prove that the "gist," or "sting" of the PrimeTime broadcasts was false. See Anderson v. Cramlet, 789 F.2d 840, 843 (10th Cir. 1986); Akins v. Altus Newspapers, Inc., 609 P.2d 1263, 1266 (Okla. 1977); Oklahoma Publishing Co. v. Gray, 280 P. 419 (Okla. 1929); cf. Crittendon v. Combined Communications Corp., 714 P.2d 1026, 1029 & n.2 (Okla. 1985). Based on the undisputed facts, Tilton cannot meet that burden.

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[3]"Whether a statement is one of fact or of opinion is a question of law for the Court." Metcalf v. KFOR-TV, Inc., 828 F. Supp. 1515, 1529 (W.D. Okla. 1992).

2. The Nature of Tilton's Burden of Proving Actual Malice

Tilton must prove not only falsity but also "actual malice" by clear and convincing evidence. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968); Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981); Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323 (10th Cir. 1984). The Sullivan Court adopted the actual malice standard so that the news media would not be required "to guarantee the truth of all [their] factual assertions," reasoning that such a requirement would lead inevitably to self-censorship of truthful speech important to a self-governing society. 376 U.S. at 279.

The Court in Sullivan defined "actual malice" as "knowledge that [the statement] was false or . . . . reckless disregard of whether it was false or not." 376 U.S. at 280. In St. Amant v. Thompson, supra, the Supreme Court made it clear that even the "reckless disregard" component of actual malice must be judged according to the defendant's subjective state of mind -- not according to a "reasonable" person standard. As the Court there stated:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

390 U.S. at 731 (emphasis added). See Hardin v. Santa Fe Reporter, supra, 745 P.2d at 1326; Miskovsky v. Tulsa Tribune, supra, 678 P.2d at 246-47.

Cases following Sullivan have thus made plain that a court considering a libel suit must address a core question: Did the defendant actually know at the time of the broadcast that the

statements at issue were false, or did it have serious contemporaneous doubts about the truth of the statements at issue? See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-11 (1984); Hardin v. Santa Fe Reporter Inc., supra, 745 F.2d at 1326. Moreover, the relevant legal issue is knowledge of falsity of the specific statements at issue. "[D]efamation plaintiffs cannot show actual malice in the abstract; they must show actual malice in conjunction with a false defamatory statement." Tavoulareas v. Piro, 817 F.2d 762, 794 (D.C. Cir.) (en banc) (emphasis in original), cert. denied, 484 U.S. 870 (1987).

Under these strict guidelines, courts have had little difficulty in finding that conduct on the part of the press which on its face might seem wrong-headed, misguided or even improperly motivated did not satisfy the heavy burden of proof that the First Amendment and New York Times v. Sullivan and its progeny impose on a public figure libel plaintiff. Thus, courts have found as insufficient proof of actual malice evidence of biased news reporting;[4] news reporting not in accord with professional standards;[5] excessive, intemperate, unreasonable or abusive reporting;[6] resolution of ambiguities in

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[4]Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("A previously formed belief rebuts as much as it establishes constitutional malice, as it tends to demonstrate sincerity.").

[5]Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 665 (1989) ("Petitioner is plainly correct in recognizing that a public figure plaintiff must prove more than an extreme departure from professional standards . . . .").

[6]Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 10 & n.3 (1970) (jury instruction that permitted finding of actual malice based on "'character of . . . publication [that was] so excessive, intemperate, unreasonable and abusive as to defy any other reasonable conclusion'" held to be "error of constitutional magnitude").

defamatory ways;[7] or failure to retract defamatory statements.[8]

When a broadcaster televises comments on the actions of a public figure, so long as it does not broadcast false matter knowingly or with awareness of probable falsity, it has no obligation under the libel law to present both sides or seek out witnesses favoring the other side. Machleder v. Diaz, 801 F.2d 46, 55 (2d Cir. 1986), cert. denied, 479 U.S. 1088 (1987); Perk v. Reader's Digest Ass'n, 931 F.2d 408, 412 (6th Cir. 1991); Westmoreland v. CBS Inc., 601 F.Supp. 66, 68 (S.D.N.Y. 1984). There is no legal obligation even to interview the subject of its criticism, let alone to publish the subject's statement. See Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 975 (D. Minn. 1967), aff'd per curiam, 398 F.2d 346 (8th Cir. 1968); Davis v. Costa-Gavras, 654 F. Supp. 653, 657 (S.D.N.Y. 1987). When, as here, such effort is made and the subject refuses to be interviewed, courts have recognized that actual malice is particularly hard to prove.[9]

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[7]Time, Inc. v. Pape, 401 U.S. 279, 290 (1971) ("Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under New York Times.").

[8]New York Times Co. v. Sullivan, supra, 376 U.S. at 286 ("The Times' failure to retract upon respondent's demand . . . is . . . not adequate evidence of malice for constitutional purposes."); Anderson v. Rocky Mountain News, 15 Media L. Rep. (BNA) 2058, 2060 (10th Cir. 1988) (per curiam) ("[R]efusal to retract the statement does not show malice.").

[9]See, e.g., Jurkowski v. Crawley, 637 P.2d 56, 60 (Okla. 1981) (no actual malice where, inter alia, "the plaintiff refused a blanket offer to discuss charges made against him"); Bichler v. Union Bank & Trust Co., 745 F.2d 1006, 1016 (6th Cir. 1984) (no proof of actual malice where, inter alia, reporter "made several attempts to contact [plaintiff], without success"); Bell v. Associated Press, 584 F. Supp. 128, 129 n.4, 132 (D.D.C. 1984) (plaintiff football player could not prove actual malice where, inter alia, reporter was unable to contact plaintiff, team spokesman contacted by reporter declined comment and team refused to give

In this case, Tilton not only declined all of ABC's repeated requests for an interview; it was the policy of his Church not to provide information about itself to the press. Tilton's prayer ministers were instructed that "IF ANY REPORTERS OR NEWSPAPER PEOPLE CALL IN, DO NOT GIVE THEM ANY INFORMATION" (Abrams Aff. Ex. 43 at 23); Marte Tilton, the head of operations of the Church, confirmed that that policy was routinely followed by the Church. (Abrams Aff. Ex. 9 at 150-51)

Finally, where the plaintiff asserts that a publication defames him by implication, the actual malice element requires a showing that the defendants intended the particular implication ascribed by the plaintiff to the article. See Newton v. National Broadcasting Co., 930 F.2d 662, 680-81 (9th Cir. 1990), cert. denied, 502 U.S. 866 (1991); Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1318 (7th Cir. 1988); Woods v. Evansville Press Co., 791 F.2d 480, 487 (7th Cir. 1986). As shown below, Tilton's Complaint typically ascribes to the PrimeTime reports meanings that ABC simply did not state or imply. Tilton cannot demonstrate actual malice by mischaracterizing the reports in this manner.

B. The Standards Governing This Summary Judgment Motion

To withstand defendants' motion for summary judgment, Tilton must show evidence at this time and on this motion that raises a genuine issue of material fact concerning each element of his claim.

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reporter telephone number where plaintiff could be reached); Trapp v. Southeastern Newspapers Corp., 10 Media L. Rep. (BNA) 1985, 1995, 1996 (S.D. Ga. 1984) (newspaper cannot be held liable for error where, inter alia, reporter "attempted to elicit a confirmation or denial from plaintiff"); Moorhead v. Millin, 542 F. Supp. 614, 619 (D.V.I. 1982) (summary judgment granted in favor of defendant where plaintiff told reporter before article's publication, "'I have no comments to make'" about substance of article).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52 (1986). The Supreme Court has made clear that

> "When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finding of fact to find actual malice by clear and convincing evidence."

Anderson v. Liberty Lobby, 477 U.S. at 254. Because Tilton bears the burden of proving falsity and actual malice by clear and convincing evidence, it is he who must come forward on this motion with a showing that he can meet his burden; to prevail on the motion defendants do not need to show either truth or the absence of actual malice. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Rocky Mountain News, supra, 15 Media L. Rep. (BNA) at 2060 (10th Cir. 1988)("The mere rejection of plaintiff's version of events, standing alone, is not sufficient circumstantial evidence to support a reasonable jury finding that plaintiff has shown actual malice by clear and convincing evidence").

Because of the heavy burden placed on public figure plaintiffs to show that defendants know the falsity or in fact had doubts as to the truth, summary judgment motions are often granted on the ground of absence of actual malice. See Tatum v. Philip Morris, Inc., 16 F.3d 417, 1993 WL 520983, at **4 (10th Cir. 1993) (text on WESTLAW), cert. denied, 114 S.Ct. 1833 (1994) (pursuant to the rules of the 10th Circuit, a copy is attached hereto); Gray v. Udevitz, 656 F.2d 588, 592 (10th Cir. 1981); Jurkowski v. Crawley, supra, 637 P.2d at 60; Hodges v. Oklahoma Journal Publishing Co.,

617 F.2d 191 (Okla. 1980); Meistrell v. McPhail, 788 P.2d 1387, 1389 (Okla. Ct. App. 1990); Secord v. Cockburn, 747 F. Supp. 779 (D.D.C. 1990). Similarly, summary judgment is appropriate where plaintiff cannot meet its burden of proving substantial falsity. See, e.g., Anderson v. Cramlet, 789 F.2d at 842-46; Rinsley v. Brandt, 700 F.2d at 1308).

## II. TILTON IS UNABLE TO SATISFY HIS BURDEN OF PROVING FALSITY AND ACTUAL MALICE WITH RESPECT TO THE STATEMENTS AT ISSUE

### Introduction

From the day this case began, Tilton has accused ABC of accusing him of "mail fraud." (Abrams Aff. Ex. 3 ¶ 15) While the broadcasts were undoubtedly critical of Tilton, nothing in them made any such charge. We deal in the remainder of this brief with what the broadcasts did say, and we demonstrate that plaintiff cannot come close to meeting his heavy burden of demonstrating either falsity or actual malice.

By way of introduction, however, it is worth noting that discovery has established that the level of Tilton's callous misbehavior towards his followers was far more egregious than anything even suggested by the broadcasts.

Tilton complains, for example, that the first broadcast wrongly described a hotel he stayed at in Colorado on a supposed retreat as "posh" when it was merely "a regular hotel." We deal with that contention at p. 46 with the brevity it deserves. What discovery has revealed about Tilton's Colorado sojourn, however, is something far closer to mail fraud than anything Tilton attempts to extract from the broadcast. It is that Tilton signed a letter on or before the second day of his five-day stay in Colorado which falsely asserted that it had been written after the conclusion of his stay there. According to the letter, Tilton had "just returned from my Prayer

Mountain meeting with God" in Colorado; that he had "come back with a great anointing and faith"; and that "[s]ince I have come down from the mountain," God had offered a "tremendous outpouring of power, signs and wonders." The truth -- undeniable and unforgivable -- is that Tilton had not returned from the mountain at all when he (or his ghostwriter) wrote the letter. The letter was enclosed with a cover memo of September 24, 1991, the second day of his five-day stay in Colorado. (Abrams Aff. Ex. 7 at 405-24, Ex. 72) The secular word which best describes that behavior is fraud.

The same word may fairly be used to describe Tilton's treatment of the prayer requests received from his followers. Tilton routinely urged his "prayer partners" to respond with the greatest speed to his entreaties for prayer requests and money. In one typical mailing to his followers, he enclosed envelopes addressed to himself in Dallas with the words "Take to Robert Tilton's office immediately" imprinted on them. (Abrams Aff. Ex. 36) What he did not tell his followers was that those envelopes, on arrival at the Dallas post office, would be sent not to Tilton's office but to a bank in Tulsa; after all money was removed from them, they were sent to a company in Tulsa whose employees, trained in word processing, would choose a form letter supposedly signed by Tilton by way of response; and only then would the envelopes be sent back to Dallas to Tilton's Church. There at least, the follower might expect, Tilton would do what he had promised: "When I have read the miracle handkerchief prayer request sheet that you fill out," Tilton had written, "I will know exactly what you have applied it to." But Tilton acknowledged that he did not read all the "miracle prayer request sheets" that his followers sent in to him as he had promised to: his "staff" did so. As for Tilton himself, he could not, he agreed, know what concerns all his followers had sought his prayers for, notwithstanding the clarity of his assertion that "when I have

read the . . . request sheet that you fill out, I will know . . ." (Abrams Aff. Ex. 7 at 119-21)

We could cite much more to demonstrate a level of duplicity of Tilton to his followers worthy of the most severe moral condemnation. There was the use of temporary AT&T operators to pose as "prayer ministers" by instructing them to say "Your miracle will come as you pray with Pastor Bob the Prayer of Agreement." (Sawyer Aff. Ex. 3) There was the constant pressure on all who responded to Tilton's television ministry to vow at least a $100 contribution -- whatever the depths of their poverty. (Id.) And there was the failure ever to disclose to his prayer partners the belief of Robert Tilton (as duly reflected in the minutes of his Church) that "a minister of a prosperity church must prosper in order that he can be fulfilled since he must prosper in order that his faith in religious convictions can be fulfilled" (Abrams Aff. ¶ 59); or to disclose his Church's "fundamental tenant" [sic] that "all of God's children should prosper and the pastor of its Church is not ever to be excluded from this belief of prosperity." (Abrams Aff. ¶ 60) It says much about Robert Tilton that, by the most deliberate of designs he never told his often impoverished followers that his own prosperity played so dominant a role in his treatment of them. (Abrams Aff. Ex. 7 at 543-48) That failure -- and that deception -- provides more than ample justification for the ABC broadcasts at issue in this case.

* * *

We turn next to the three particular statements emphasized by Tilton in his Complaint and throughout the history of this case -- the so-called Haiti, Holy Water and Prayer issues. We then turn to the remaining topics of the PrimeTime broadcasts challenged by the Complaint. With respect to each of these topics, we demonstrate below that Tilton can neither prove that the gist of what ABC reported was false, nor prove that ABC either believed it to be false or had serious doubts as to its truth.

A. The Orphanage in Haiti

ABC reported on its investigation into Tilton's purported support of an orphanage in Haiti. PrimeTime I reported:

> "DIANE SAWYER: And what about this mission, Tilton's orphanage in Haiti. We kept thinking about Bob Jones and how he told us you could just fix yourself up a sign and claim an orphanage.
>
> BROTHER BOB JONES: Put your name on there, whatever you want.
>
> SAWYER: [voice-over] Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no.
>
> [interviewing] So nothing from Robert Tilton here?
>
> HAITIAN OFFICIAL: No."

Tilton seeks to challenge this statement by mischaracterizing it. Without regard for what the broadcast actually said, Tilton alleges that ABC accused him of mail fraud, explaining "Pastor Tilton states in his Church's magazine that he provides financial support to an orphanage in Haiti; Sawyer says he doesn't." (Abrams Aff. Ex. 3 ¶ 15) But the broadcast did not say that Tilton does not provide any support for anyone's orphanage in Haiti. What the broadcast carefully and accurately did say is that ABC looked for but was unable to find a Robert Tilton orphanage. It is a fundamental element of the subjective actual malice requirement that Tilton cannot demonstrate actual malice on the part of ABC with respect to a

meaning ABC did not state or intend to imply. See pp. 24-25, supra.[10]

With respect to what ABC did report, the undisputed facts demonstrate that the report was entirely accurate. The facts detailing ABC's exhaustive efforts to locate Tilton's orphanage are set forth in the Sutherland Affidavit and are undisputed. In denying Tilton's motion for a preliminary injunction, Judge Brett reviewed substantially identical affidavit testimony by Ms. Sutherland and the hearing testimony of Rev. Lee Sullivan -- the alleged founder and director of the Haitian orphanage to which Tilton contributes -- and made extensive findings of fact. 827 F. Supp. at 680-81. Judge Brett concluded that:

> "The record thus far indicates that the Defendants were making a reasonable effort to locate the Haitian orphanage with which the Tilton Ministries was associated and supported." Id. at 681.

Discovery has not only confirmed Judge Brett's finding, it has lent it even greater support.

First, discovery has revealed no basis whatsoever to challenge defendants' testimony concerning their efforts to locate

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[10]Tilton attempts to support his claim of actual malice by citing testimony by Diane Sawyer and Kelly Sutherland that they did believe that Tilton provided some support to some orphanage in Haiti. Far from demonstrating actual malice, this testimony only reaffirms what is clear from the broadcast itself -- that ABC did not intend to say that Tilton did not support any orphanage. See Saenz v. Playboy Enterprises, 841 F.2d at 1319 ("That the defendants lacked evidence of Saenz's complicity in torture does not demonstrate an intent or awareness that the article implicitly accuse him of such conduct. If anything, the lack of such evidence tends to support the defendants' contention that they did not intend or believe that the article so accused Saenz."). If the report implied anything at all beyond what it said, it was that any contribution by Tilton to an orphanage was not substantial enough to justify describing the orphanage as "Tilton's" or to gain the attention of Haitian officials.

Tilton's orphanage, i.e., the efforts Judge Brett concluded were "reasonable." Plaintiff himself testified that he has no knowledge of what efforts ABC made to find the orphanage. (Abrams Aff. Ex. 7 at 376)

Moreover, Tilton admits that his ministry never owned or operated an orphanage in Haiti. (Abrams Aff. Ex. 7 at 60) Notwithstanding references in Tilton's magazine to a "Robert Tilton Ministries Children's Home" and a "Children's Hope Center" in Haiti, Tilton admits that there is no place in Haiti bearing either name. (Abrams Aff. Ex. 6 at 413, Ex. 7 at 365-66)

What then is Tilton's complaint? Tilton asserts that his Church "regularly provided financial support" to the "World Harvest Orphanage in Port-au-Prince, Haiti." (Abrams Aff. Ex. 3 ¶ 40)[11] Plaintiff alleges that since ABC ultimately learned the name of the orphanage and the individuals who ran it (Rev. and Mrs. Sullivan), it could have and should have located the orphanage had it looked harder. But plaintiff's claim is fatally flawed -- both factually and legally. With respect to the facts, it is undisputed that ABC did look -- and looked exhaustively -- for any orphanage in Haiti with any of the 3 names used by Tilton to describe it. ABC checked with Haitian government officials; reviewed lists of religious and benevolent organizations which were obliged to be filed with the Haitian government; sent missionaries with extensive knowledge of

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[11]In seeking to demonstrate actual malice with respect to PrimeTime II, Tilton contends that after PrimeTime I but before PrimeTime II his attorney provided ABC with information evidencing Tilton's contributions to an orphanage in Haiti. Tilton misses the mark, however, because PrimeTime II did not say that Tilton provided no support. Instead, PrimeTime II reported: "So even though his magazine calls it the Robert Tilton Ministries Childrens Home, it's not really Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage." (Abrams Aff. Ex. 2 at 13) Every word in that sentence was true. While Tilton now claims to have supported an orphanage, he does not claim that it was his orphanage. Indeed, he admits that it was not.

Haiti generally and orphanages and children's homes in particular to look for the orphanage -- all to no avail. (Sutherland Aff. ¶¶ 13, 15, 16, 17, 23 & 24) And, even though Tilton's Church refused to provide the address of the orphanage referring the inquiry to the Sullivans at a post office box in Dallas, Texas -- ABC attempted unsuccessfully to locate the Sullivans in both Haiti and Dallas without response or success. (Sutherland Aff. ¶¶ 28 & 29)

More fundamentally, however, Tilton's argument that ABC could have or should have found the orphanage is irrelevant. Tilton's claim, at best, is that ABC acted negligently. But even if ABC did act negligently (contrary to the undisputed facts and Judge Brett's finding), plaintiff's claim would still fail because negligence simply does not constitute actual malice. See, e.g., Time, Inc. v. Pape, supra, 401 U.S. at 290; St. Amant, supra, 390 U.S. at 731; Hardin v. Santa Fe Reporter, Inc., supra, 745 F.2d at 1326.

Unable to quarrel with ABC's investigation, Tilton next objects to ABC's observation, in the course of its report on its efforts to locate the orphanage, that: "We kept thinking about Bob Jones and how he told us you could fix yourself up a sign and claim an orphanage." ABC had reviewed Tilton's magazine which contained a picture of the orphanage in Haiti with a sign indicating Tilton's sponsorship hanging in front. Bob Jones was a "missionary" in Haiti -- featured in an earlier report about another televangelist -- who explained to potential donors that a contribution would enable them to put up a sign in front of the orphanage claiming sponsorship and take pictures.

Discovery has confirmed that ABC's observation concerning Bob Jones was entirely accurate. Mrs. Ethelyn Sullivan, the woman plaintiff claims ran the orphanage to which Tilton contributed, testified:

"Q. For how long a period of time was the canvas sign that says, 'Sponsored by Robert Tilton Ministries,' physically affixed, hung from the Children's Shelter at your mission in Haiti?

A. As long as it took us to make pictures.

Q. Did that picture-taking session last more than one day?

A. It was probably on one of our trips, which I think it was, over there. And probably during that trip we took several -- maybe three or four different shots of the Children's Shelter. We're proud of it. After that, the sign wasn't used.

Q. After you were finished taking the picture, you took the sign down and you never put it up again?

A. No, and the rats ate it." (Abrams Aff. Ex. 19 at 108-09)

B. Items from Taiwan

Tilton also challenges PrimeTime's report that:

"Tilton sends out an avalanche of things he asks viewers to send back to him -- 'miracle prayer cloths' he promises to touch and place upon an altar, cards he says he'll place on a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing -- place your hand there and he'll put his hand there too. There's holy water from the River Jordan, 'miracle anointing oil' -- though Moore said some of the items come from the holy place, Taiwan." (Abrams Aff. Ex. 3 at ¶ 15)

Once again, Tilton mischaracterizes what PrimeTime reported, alleging that "Pastor Tilton claims that the 'holy water' he sends to viewers is from the River Jordan; Sawyer says it's from Taiwan." (Id. ¶ 15; see also ¶ 34)

Contrary to Tilton's allegation, the broadcast did not say that holy water came from Taiwan: it said that "Moore said some of the items" did. As Judge Brett found:

> "The broadcast did not say the holy water came from Taiwan. It said that some of the other items mailed to 'partners' by Tilton came from that 'holy place Taiwan.' The 'holy place Taiwan' reference was sardonic editorializing by Defendants." 827 F. Supp. at 677.

Tilton's claim is based on the contention that Jim Moore did not tell ABC that he obtained anything at all from Taiwan for Tilton. (Abrams Aff. Ex. 3 ¶ 35)

Judge Brett reviewed and analyzed in detail the videotape of ABC's hidden camera interview with Jim Moore. Judge Brett found as follows:

> ". . . In the course of the tour provided by Moore to Gordon and Anthony, they passed wall displays of materials used by Tilton in his fund-raising efforts which included a display containing a button which Tilton had furnished to his followers.
>
> ". . . Almost immediately after passing the Tilton wall displays, Gordon asked Moore: 'Where do you get all this stuff from?' When Moore then responded by asking, 'What do you mean?', Gordon stated, referring back to the Tilton display they had just passed, 'Well you know, like buttons. I just saw you have, like, water --.'

". . . In what Gordon understood to be an answer to her questions, Moore responded, 'Oh, we've got -- we've been doing this for so long that we've got it down to a science.' When Gordon responded by asking if Response Media had 'storehouses,' Moore answered by saying, 'Yeah, we get stuff from Taiwan.'

* * *

". . . Gordon reasonably could have concluded from Moore's general reference to Taiwan that some of the items Tilton mailed out may have come from Taiwan, i.e., buttons, cloth, cords. etc." 827 F. Supp. at 677 (emphasis added) (citations omitted).

Tilton can offer nothing unearthed by discovery to challenge Judge Brett's findings. Gordon states under oath that she understood Moore's Taiwan comment to be a reference to items mailed out for Tilton. (Gordon Aff. ¶ 32) Even Moore himself testified that it was possible that Gordon interpreted his comments in that manner. (Abrams Aff. Ex. 15 at 903-06) As Tilton can offer no contrary evidence, he cannot begin to prove actual malice with respect to this statement.[12] Moreover, the gist of the report was that Tilton used inexpensive items his mailings. Jim Moore admitted that he

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[12]Gordon's interpretation of Moore's ambiguous comment, even if it was a misinterpretation, was surely reasonable, as Judge Brett explicitly found. Such interpretive errors by reporters do not constitute actual malice. See Time, Inc. v. Pape, supra, 401 U.S. at 290 (challenged statement "amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under New York Times [v. Sullivan]"); Orr v. Argus-Press Co., 586 F.2d 1108, 1116-17 (6th Cir. 1978) (no actual malice where newspaper's interpretation of indictment was rational).

understood and used the "Taiwan" reference in that sense, and that Tilton did use inexpensive items, including some from Hong Kong. (Abrams Aff. Ex. 16 at 234)

C. Items That People Prayed Over and Sent to Tilton

Tilton's third main claim focuses on the handling of mail sent to Tilton by his followers, ABC reported:

> SAWYER: [voice-over] "And the items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them too? If some make it to Tilton, there are thousands that didn't. We found them in the garbage at the bank and the marketing research center. The 'angels of God,' the prayer cords, the arrows -- this person wanted his aimed at getting a real dad -- the tracing where Tilton said he'd place his hand, ripped up by the bank. We found heart-breaking appeals from followers and letters like this one. It came with personal photographs for Pastor Bob and a prayerful message. It also came with a $7,000 pledge. The money probably made it to Tilton. The prayers went in the trash." (Abrams Aff. Ex. 1 at ___; Ex. 2 at ___)

There is no dispute that Tilton's mail -- mail sent by Tilton's followers to him in Dallas -- is indeed forwarded unopened from Dallas to Tilton's bank in Tulsa, and that bank employees open the mail and deposit any money contained therein. (Abrams Aff. Ex. 3 ¶ 27) Tilton's quarrel with the report arises from the statement that thousands of items did not make it to Tilton and were found in the trash.

The affidavit of Roberta Gordon explains in detail how Ole Anthony and other members of the Trinity Foundation reported to

her the results of their "trash trip" to Tilton's bank and IDM. Anthony reported finding thousands of items sent to Tilton in the dumpsters. Anthony later showed piles of items to Gordon and Kelly Sutherland. Gordon and Sutherland state under oath that they fully believed, and had no reason to doubt, that the items shown to them by Anthony had been found in the dumpsters. (Gordon Aff. ¶ 49; Sutherland Aff. ¶ 11) Because ABC had no doubts about the truth of what it reported (and plaintiff can submit no evidence to the contrary), plaintiff cannot satisfy the actual malice requirement.

Plaintiff's attempt to claim actual malice rests on his fantastic -- and utterly insupportable -- concoction that ABC schemed and conspired to steal prayer requests, planted them in the trash, and then falsely claimed to "find" them there. Thus plaintiff alleges that:

> "The Defendants knew that no prayer requests were thrown in the trash by Pastor Tilton or any person working for Pastor Tilton. Defendants know that the prayer requests which PrimeTime showed in trash dumpsters were planted there by Defendants' own agents and employees in an attempt to frame Pastor Tilton with the crime of mail fraud." (Abrams Aff. Ex. 3 ¶ 37; see also Id. ¶ 29)

One would expect plaintiff to have some factual support before asserting such a scandalous allegation. See Fed.R.Civ.P. 11. Plaintiff has access to IDM and the Bank and has had the opportunity to conduct any discovery he wished on this issue. Yet plaintiff remains unable to demonstrate any factual basis whatsoever for the allegation that defendants stole prayer requests. In response to an interrogatory specifically directed to this issue, plaintiff offers only more baseless speculation and the bald assertion that "mail was stolen and planted." (Abrams Aff. Ex. 4 at 57) Plaintiff concedes that he

"does not presently know the identity of the persons involved." Id. at 56-57.[13]

In the face of Ms. Gordon's sworn testimony, plaintiff's speculation regarding alternative possibilities -- or his hope that defendants' testimony might be disbelieved even without any contradictory evidence -- cannot begin to satisfy his burden of proving actual malice by clear and convincing evidence. See Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 256-57 ("'[D]iscredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion.' Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment."). Tilton can present no affirmative evidence to demonstrate actual malice.

In any event, the gist of ABC's report was demonstrably true. The gist of the report concerned Tilton's preoccupation with money, a focus which led him to take the most stringent steps to assure that every penny he received was deposited at the same time the prayers of his followers were treated with the most callous indifference. Contrary to Tilton's allegations (Complaint ¶ 15), ABC did not say that most of the items sent to Tilton were thrown in the garbage. The report explicitly stated that "[i]f some make it to Tilton, there are thousands that didn't."

If anything, that statement understated the provable reality. Discovery has confirmed that thousands -- hundreds of thousands --

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[13]On the Sunday after the broadcast of PrimeTime I, Marte Tilton addressed the congregation at Word of Faith and accused ABC of having a "plant inside the bank who stole documents and information." Mrs. Tilton stated: "I guarantee you there is a search going on and when we find the person who delivered the prayer request into the hands of the press and then put it back into the dumpster they will be prosecuted." Now, more than three years later, Mrs. Tilton remains unable to identify any "plant" and unable to identify any information at all gained since PrimeTime I about there being such a "plant." (Abrams Aff. Ex. 9 at 72-74)

of items (including written prayer requests) not only did not make it to Tilton but instead were thrown in the trash on Tilton's orders. As demonstrated in defendant's statement of undisputed facts above, it is undisputed that at least 180,000 P-21B and P-21C prayers of Tilton's followers were routinely trashed and that tens of thousands of other responses to Tilton's mailings were, as well, trashed in Tulsa without ever being sent to Dallas to be prayed over by Tilton, as he had falsely promised. Additionally, tens of thousands of letters and items from followers that were not on the particular forms sent out by Tilton (referred to by Tilton as "white mail", were routinely discarded: Tilton received, instead, computer printouts with cryptic codes referencing the particular form letter that IDM data entry personnel chose to send back to the sender. (Abrams Aff. Ex. 6 at 571-72, Ex. 7 at 175-79) Tilton admits that he never told his followers that he prayed over computer printouts instead of the prayer requests themselves. (Abrams Aff. Ex. 7 at 154) Tilton's explanations, e.g., he did not ask anyone to send him things like the many photographs of his followers that were thrown in the trash (Abrams Aff. Ex. 6 at 383-84), and his followers would be "scatter-brained" if they did not write the same prayer on P-21Bs and P-21Cs as they previously had on P-21As (despite their not being instructed to do so) (Abrams Aff. Ex. 6 at 565-66), do nothing if not concede the truth of the sting of the broadcasts regarding Tilton's cavalier treatment of the very prayer requests he urged his followers to send. Moreover, under the substantial truth doctrine, it matters not whether followers' prayers were thrown away at the Bank, IDM or a Tulsa recycling center; nor whether they were thrown out on one day or

another. The sting of the broadcast was true, and Tilton thus cannot possibly prevail on this claim.[14]

D. Tilton's Phone Ministry

During his television broadcasts, Tilton encouraged viewers to telephone his phone ministry to make vows and submit prayer requests. The PrimeTime reports included interviews with Bill Hardy -- who worked as a phone minster for two years -- and with Elizabeth Montcalm -- a temporary AT&T worker who answered calls during Tilton's broadcasts from Israel in September 1990. Tilton does not challenge the accuracy of anything ABC reported concerning Bill Hardy. See ¶ 47, supra. Indeed Tilton admitted in his deposition that prayer ministers were instructed to ask callers for $100 donations and that prayer ministers were instructed to limit the

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[14]Similarly unavailing is Tilton's challenge to ABC's use in PrimeTime II of an excerpt of his deposition testimony in Tilton v. Morales. In that testimony, Tilton admitted -- as he did again in his deposition in this case -- that he does not personally pray over what he calls "white mail." In PrimeTime II ABC accurately and fairly described this testimony as an admission that he does not pray over every prayer request.

Tilton also challenges ABC's broadcast of the interview with Brenda Reynolds, the Tiltons' former housekeeper and nanny. In the segment of the interview challenged by Tilton, Reynolds explained how prayer requests were delivered to Tilton's home. Reynolds said that Tilton instructed her to store the boxes in the garage, and later to throw them in the trash. Reynolds was interviewed by defendants Diane Sawyer and Kelly Sutherland, both of whom state under oath that they believed what Reynolds told them to be true. There is no evidence to show that ABC had any doubts whatsoever as to Reynolds' veracity and credibility. Indeed, both plaintiff and Mrs. Tilton have testified that they considered Reynolds to be trustworthy. (Abrams Aff. Ex. 6 at 391, Ex. 9 at 254) Plaintiff nevertheless argues that since Reynolds was not in Tilton's presence at all times, her account should not have been considered reliable. In fact, Tilton's prayers -- often conducted in his clothes closet, surrounded by suits and shoes -- were never seen by anyone, including his wife and closest associates. ABC had no reason to doubt and did not doubt the truth of what Reynolds said. There is no actual malice.

time of each call, just as Hardy had said. (Abrams Aff. Ex. 7 at 382)[15]

With respect to Montcalm, she explained on the broadcast her own experience answering calls for Tilton:

> "I got people calling about their son being on drugs or alcoholics or husbands being an alcoholic. I mean, people are telling me their most intimate

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[15]One former prayer partner, Ora Watson, testified that both she and her husband have been on disability for several years. After seeing Tilton on television, she called the prayer ministry. Ms. Watson testified:

> "I called him for prayer at first and that's when he asked me to make a vow that I would, and I told him that I was on disability, I wasn't able to pay this vow so you know I just decided after he asked me again, whoever it was who answered the phone, I can't really say it was him, but whoever answered the phone asked me a vow. I told him that I was on disability but they kept asking me about it. I tried to pay on it. They was asking me about a $100 vow."

Ms. Watson testified that thereafter she sent Tilton prayer requests, two $5 contributions and one $10 contribution. She testified:

> "Q: What was your understanding about what Reverend Tilton would do with your prayer request? -
>
> A: I thought he would put them on the little table that he had in the little room and pray over them like he said he was doing on the TV.
>
> Q: And did you think that he would read them?
>
> A: Yes, I did.
>
> Q: Did you think he would read your prayer request?
>
> A: I sure did." (Abrams Aff. Ex. V-3)

One of Ms. Watson's prayer requests was among those found in the trash.

> secrets, their personal stuff about themselves. And here I am, you know, just a temporary employee from AT&T."

Tilton testified that there was nothing in Montcalm's statement that he believes to be untrue. (Abrams Aff. Ex. 7 at 399) Tilton's only claim appears to be based on ABC's introduction to Montcalm: "When Tilton went to Israel last year, she and others at AT&T were asked to pose as Tilton prayer ministers." Tilton asserts that the AT&T employees were "only there to take down the caller's prayer request" and were "not to do any counseling." (Abrams Aff. Ex. 4 at 37)

ABC's description of the AT&T employees posing as prayer ministers was demonstrably true. Documents provided to ABC by Montcalm showed that the AT&T employees were instructed to answer the telephone by saying "Thank you for calling Success-N-Life Ministry." They were told to tell "rambling" callers "Your miracle will come as you pray with Pastor Bob the Prayer of Agreement." Tilton testified that he "d[oes]n't have a problem with" the AT&T operators saying these things to callers. (Abrams Aff. Ex. 7 at 390-91) Montcalm made clear that the AT&T operators discussed the most intimate matters with callers. Moreover, on the air from Israel while the AT&T operators were answering the phones, Tilton did not tell viewers that AT&T operators in Florida would answer their calls; instead he told viewers that calls went to a "miracle prayer center in Dallas" manned by "prayer ministers." (Abrams Aff. Ex. V-4) By all appearances, and as evidenced by the calls Montcalm received, callers surely expected their calls to be answered by Tilton's prayer ministers in his Church in Dallas, not temporary AT&T employees in Florida.

That Montcalm and her AT&T colleagues were told to pose as prayer ministers is simply indisputable -- as is the reality that ABC believed just that.

E. Tilton's Financing His Church Through a Loan Obtained from Herman Beebe

Tilton challenge ABC's report with respect to Tilton's having obtained a loan from Herman Beebe to help Word of Faith grow in its early years. ABC reported:

> "And by 1981, [Tilton] had hit the big time. How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling. Herman Beebe, a financier whose banks gave Tilton a $1.3 million loan, though Tilton claims he never met the man."

Tilton concedes that ABC conducted an "extensive investigation of the relationship between Plaintiff and Herman Beebe." (Abrams Aff. Ex. 4 at 35) As set forth in detail in the Gordon Affidavit, since Tilton would not talk to ABC, it interviewed close business associates of law enforcement officials who prosecuted Beebe, and other reporters who had investigated and written about Beebe. ABC learned that Tilton had obtained a $1.3 million loan from Beebe's bank in 1980, that press accounts as far back as 1976 had linked Beebe to organized crime, and that Tilton's spokeswoman was quoted in the Dallas Morning News as saying that Tilton did not know Beebe. There is no evidence to suggest -- much less prove by clear and convincing evidence -- that ABC did not believe in the accuracy of what it reported.

Moreover, discovery has confirmed the accuracy of ABC's report. Tilton testified that back in the early 1980s his Church had attempted to secure a loan, but was unable to do so. Tilton then learned about Beebe's insurance company in Shreveport, Louisiana as a possible source of a loan. Tilton admits that he flew to Shreveport to meet with Beebe and that, while accompanying Beebe on a return flight aboard Beebe's private jet, Beebe told Tilton he

would agree to loan the Church $1.3 million. (Abrams Aff. Ex. 7 at 439-41) Tilton admits that he made numerous telephone calls before any monies were received. (Abrams Aff. Ex. 7 at 447-49) Tilton further testified that he may have attempted to obtain a second loan from Beebe before the $1.3 million loan was paid off. (Id. 445-46) Tilton also admitted that according to press reports and what he has been told. Beebe was involved in organized crime activities. (Id. at 439)[16]

In light of the undisputed accuracy of ABC's report, Tilton can hardly demonstrate actual malice. In response to interrogatories directed to that issue, Tilton explains that ABC had no evidence of illegal conduct by Tilton or of Tilton being linked to Beebe's criminal activity. (Interrogatory Answer at 33) But ABC did not accuse Tilton of any criminal activity in connection with the Beebe loan. The report instead explained the circumstances surrounding Tilton's rising to prominence by obtaining the loan from Beebe, a man Tilton now admits has been linked to organized crime -- and who, indisputably, had been linked to organized crime before Tilton borrowed money from him. The report was completely accurate and published without actual malice.[17]

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[16]After discussing the Beebe loan, PrimeTime reported "after Tilton got the money, he got a new image, too -- a permanent wave for his hair, plastic surgery and, like his good buddy, Jim Bakker, a talent for tears on demand." It is undisputed that Tilton did get a permanent wave and plastic surgery after receiving the Beebe loan. Tilton nevertheless asserts that ABC "had no evidence that any of the Beebe loan money was used for the permanent wave and/or plastic surgery." (Abrams Aff. Ex. 4 at 36) The point of the report was to recount Tilton's rise to success. ABC did not say that the loan proceeds actually paid for Tilton's haircut and plastic surgery.

[17]Tilton's only real quarrel with the report seems to be not with the facts reported, but rather with the characterization of those facts as Tilton having "courted" Beebe. As set forth above, in order to be actionable, a statement must be provable as false. The undisputed facts are that when no one else would loan money to Tilton, Tilton flew off to seek Beebe's assistance and the assistance was

F. Tilton's College Days

The PrimeTime reports included an interview with John Michael Taylor, a college friend of Tilton's. The gist of the report was that, while in college, Tilton and his circle of friends used to get drunk, do drugs, mock religious preachers and talk of becoming rich as preachers one day.

The gist of this report was true. Tilton himself has admitted that in college he used to drink and use drugs, including marijuana, LSD and barbiturates. (Abrams Aff. Ex. 7 at 12) Mrs. Tilton testified that early in their marriage both she and Tilton were drug abusers. (Abrams Aff. Ex. 9 at 31)

A review of the interview with Taylor reveals that the gist of Taylor's comments was reported accurately. Taylor told of how the group of friends that included Tilton would listen to revival preachers on the radio and "we copied the rhetoric of these on the preachers, and made fun of it. Made a satire of it." He told how the group would get drunk and satirize preachers at tent revivals. Gordon then asked:

"Q: And Tilton was right in there?

Taylor: Tilton was right in there.

Q: And he mocked it all out, he didn't buy it, he wasn't really saved?

Taylor: We had, we had a parody that we would drop into at parties, of preaching. And would

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given. ABC's editorial characterization of these efforts by Tilton to obtain a loan from Beebe as "courting" is accurate. See Random House Dictionary of the English Language 464 (2d ed. 1987) (definition of "to court" is "to try to win the favor, preference, or goodwill of"). In any event, the characterization falls well within the bounds of constitutionally protected opinion. See Miskovsky v. Oklahoma Publishing, 654 P.2d at 593 (opinion or "judgmental statement in which the maker of the same expresses his views" cannot be libelous).

emulate revival preachers that we had heard an the air at parties, and everyone would praise the Lord, and fall on their knees, and we were all drunk and high and stoned, and having a good time, and had our women with us, and everybody was crazed, and this was just part of the party. And he was there, yes, he was there. And many was the time, that I myself told him, and he was definitely present when I said that when we graduated, if we really wanted to get rich, we would not pursue our chosen careers, that we would buy a DC3, a good tent, a dynamite sound system, a good Amen section, and fly around the county and get rich.

Q: And what was his reaction when you said that.

Taylor: There was no reaction, it was reiterated time and time again. It was a matter of concept that probably all of us felt.

Q: So he thoroughly agreed with that? That that was –

Taylor: At the time that we said it he was truly in tune with our emotions." (Gordon Aff. Ex. 18 at 11-12)

Moments later, Ms. Gordon again asked about Taylor and Tilton talking of getting rich as preachers:

"Q: I[t] seems, you told me that one of the things that you two used to joke about was, you said, if you wanted to get rich you would go get the DC10, but didn't you also used to say that, you know, well, if we are ever really down and out we'll go . . .

A: Oh, yeah. Well, I mean that was just a part or it. We said if we didn't, if, after we graduated that we had a hard time making a living, or if we weren't making the kind of money that we wanted to, that what we should do. would be to grab an audience, become a revival preacher. And through that means we would be able to get rich. There was no doubt in our minds that if these other people could achieve wealth and fame through this kind of sham, which is what we saw it as, we grew up in the Church, we knew what the Church was, we were not throwing down on the Church, we were throwing down on this particular breed of people that seemed to be parasites off of the Church. I mean anybody that would buy a sliver of the cross, of the original cross, or buy a genuine autographed picture of Jesus Christ, I mean those people are obviously in such great need that they would believe anything. And if you can find a market that will believe anything, and will pay money for anything, it's very easy to take their money.

Q: You mentioned that you do your monologue at parties and everything. Was, was, did he do it? Could he do it?

A: Tilton trying to emulate the preachers at that time was, I'm sure that he, we all tried to throw a pitch at one time or another. It was just part of our standard patter, our repartee. We would throw it back and forth. Everyone would attempt it. I personally thought I was a lot better at it than he was. But, I'm sure that, at this stage of the game, I would have to look at him and say that he had

> become a lot better at it." (Gordon Aff. Ex. 18 at 14-16)

Tilton nevertheless contends that Taylor "equivocated in his recall of Plaintiff's participation" in mocking preachers. (Abrams Aff. Ex. 4 at 30) But what Taylor said -- with respect to the tent revivals in particular -- was:

> "It's been so long ago that I, I can't recall the specific time and place him there to swear to it. I can say that it took place more than one time. That it was in the behavior pattern of the group that we ran with. That it was known to all of us. That it happened and was talked about. And he was present, and he was in that group. Whether or not he actually went down to the front, and fell on his knees, and quaked and spoke in tongues, I cannot say. But he was running with the group that did, and that made fun of the preachers, and that held that kind of behavior in high contempt." (Gordon Aff. Ex. 18 at 13; emphasis added)

Plaintiff carefully -- and inexcusably -- omits the underlined language when he quotes this passage in this interrogatory answer.

The gist of Taylor's comments was that Tilton and his friends mocked preachers and talked of becoming preachers one day to make money. That is what ABC reported.

Plaintiff can offer no evidence to show that ABC did not believe in the truth of the gist of what Taylor said. Instead, plaintiff focuses on ABC's editing of the Taylor interview for use on the broadcast. Plaintiff cites a change in Taylor's use of the word "I" to the word "we." As the above quotations reflect, in two separate instances Taylor told Gordon about talk between Tilton and himself of making money as preachers. In one instance Taylor began by,

saying "I said"; in the second he said "we said." Even when using "I," however, he made clear Tilton's involvement and agreement. As set forth in the Gordon Affidavit, for reasons of clarity, the "I" quotation was changed to "we." (Gordon Aff. ¶ 75) The meaning of Taylor's comments was not altered in any way.

The Supreme Court has held that the alteration of a quotation is insufficient to establish actual malice. Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991). The Court recognized that it is often necessary for journalists to reconstruct a speaker's statement -- even when it has been tape-recorded -- for any number of reasons, including "the practical necessity to edit and make intelligible a speaker's perhaps rambling comments." 501 U.S. at 515. The relevant issue in determining issues of actual malice and falsity is whether the alteration affected a material change in the meaning of the statement. If, as here, the gist of the speaker's meaning is accurately conveyed, no injury to plaintiff's reputation is caused by the change. 501 U.S. at 517.

The PrimeTime report of the Taylor interview accurately conveyed that gist of Taylor's comments, and there is no evidence that ABC doubted the truth of that gist. Tilton cannot prove actual malice.

G. Tilton's Lavish Lifestyle

PrimeTime also revealed that although Tilton claimed God had sent him to serve the "people that are beat up, that are hurting," he himself lived a lavish lifestyle not disclosed to his followers. PrimeTime reported that "his followers believe what Tilton says about himself in the ministry magazine, that he only gets a salary set by an independent firm and one perk, a parsonage." The report then cited several examples of Tilton's lavish lifestyle, all of which were indisputably true. See Statement of Undisputed Facts ¶¶ 68-78; Abrams Aff. ¶¶ 59-73.

Tilton nevertheless contends that ABC acted with actual malice because "ABC knew that plaintiff only had one parsonage at a time." (Abrams Aff. Ex. 4 at 41)[18] Tilton's argument misses the point. The gist of ABC's report was not that Tilton lived in more than one house at a time but rather that unbeknownst to -- and in stark contrast to -- his poor and hurting followers, he lived lavishly in "parsonages" that are hardly the modest homes that that word conveys. Whether Tilton lived in more than one extravagant home at a time, or instead moved about from one to another, does not affect the truth of the gist of the report.[19] There is no dispute that

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[18]In interrogatory answers, Tilton also cites a second basis for his allegation of actual malice -- that ABC knew that Tilton "did not have unlimited access to all the Church's money." (Abrams Aff. Ex. 4 at 41) Citing bank documents in which Church assets were listed to support a personal loan application by Tilton, ABC did report that the Church was run like a "sole proprietorship" and that Tilton had access to its wealth. Tilton's allegation of actual malice with respect to this statement is simply irrelevant since the Complaint does not even challenge that part of the PrimeTime reports. In any event, the gist of that part of ABC's reports was true. It is undisputed that -- as ABC reported -- the Church's Board of Directors consisted only of Tilton, his wife and his secretary. Although he brings this action in his individual capacity, Tilton admits that the Church has paid the extensive costs of this litigation. (Abrams Aff. ¶ 63) Moreover, when plaintiff and Mrs. Tilton were divorced, as part of their personal divorce settlement the Church's school was separately incorporated with control given to Mrs. Tilton. The Church gave the school property that was then sold for $4.4 million. (Abrams Aff. Ex. 9 at 17)

[19]With respect to Tilton's trip to Colorado, Tilton objects to ABC's characterization of the trip as a fundraising campaign. But Tilton has admitted that during the broadcasts from Colorado he encouraged viewers to pay vows and the broadcasts repeatedly referenced the payment of vows, tithes and offerings. Although Tilton does not dispute any of the facts reported about where he stayed in Colorado, he maintains that the hotel was "average," not "posh," citing the fact that he had to carry his own bags. (Abrams Aff. Ex. 4 at 45) The use of the adjective "posh" is opinion based on undisputed facts -- the hotel was, after all, shown in the broadcast - and, because it is not provable as false, it cannot support a libel claim. See Miskovsky v. Oklahoma Publishing, 654 P.2d at 593-94.

ABC believed that to be true at the time of broadcast, and that it was in fact true.[20]

H. Response Media

Tilton challenges PrimeTime's report concerning the role of the company Response Media in Tilton's ministry. PrimeTime described Response Media as the "nerve center" of the ministry and the organizer of its direct mail operation. Tilton contends that Response Media was "only a printer for Plaintiff" and that "IDM handled the mail for Plaintiff." (Abrams Aff. Ex. 4 at 20-21)

The portion of the PrimeTime reports at issue were based on a hidden camera interview of Jim Moore, president of Response Media. As the transcript of that interview demonstrates, Moore described his role as far more than that of "only a printer." During the interview, Moore explained to Ole Anthony and Robbie Gordon the wide range of services Response Media could provide to a ministry. Sophisticated direct mail strategies, market research techniques, and statistical analyses were described by Moore. With respect to Tilton in particular, Moore portrayed himself as

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[20]It is anomalous that Tilton would challenge as libelous the report of his lavish lifestyle. A Church document dated May 1989 explained:

> "One of the basic tenants of the prosperity church is that if you give you will be blessed spiritually, financially and physically. A minister of a prosperity church must prosper in order that he can be fulfilled since he must prosper in order that his faith in his religious convictions can be fulfilled."

Tilton testified that he believed that to be true in 1989, and he believes it to be true today (Abrams Aff. Ex. 7 at 543-44), even though he could not cite a single example of his telling his followers that. Asked if he was "living well," Tilton answered: "Preaching prosperity and living prosperity. I believe prosperity, and I just didn't hide it in a corner." (Id. at 547) Ms. Tilton agreed that her husband thought it was important for him to be "blessed financially if the Church was blessed." (Abrams Aff. Ex. 9 at 87) Once again, however, Tilton said nothing of the sort to his followers.

responsible for Tilton's success, claiming that when he first became associated with Tilton, Tilton was "about out of business." Moore continued:

> "Mr. Moore: Well, you know the history. He was having a very difficult time. In fact, almost -- I don't know if he knew what to do at the time. When he first came on, the first mailing program that we did with him he tried to convince me -- he wanted to go with this real slick -- and Bob -- Bob has got many different, I'll say sides or -- to him.
>
> Mr. Anthony: Aspects.
>
> Mr. Moore: Aspects to him. And what he felt would work and what would actually work were two different things. And once he saw that this wouldn't work, he was willing to go with this. And --
>
> Mr. Anthony: Well, he's done -- he's done tremendous.
>
> Mr. Moore: Bob is doing far better than anyone knows." (Gordon Aff. Ex. 7 at 175)

Moore claimed to have commuted from Tulsa to Tilton's Church in Dallas every day for two years and, in reference to the assistance Moore provided to Tilton in reorganizing his ministry, stated that he "worked with them. As far as taking everything out of house. Closing some things down that weren't profitable for them." (Id. at 177) He also said that Response Media did media buying for Tilton's Church. (Id. at 176)

Moore outlined the process utilized for handling the mail of his ministry clients -- mail would be sent to a post office box in Dallas and forwarded automatically to Commercial Bank and Trust in Tulsa. Then, Moore explained, "Commercial Bank does the opening and takes your money and puts it in your account. All we

get is the paper document and how much the person gave." (Id. at 35)

As its president thus explained it, Response Media was indeed the "nerve center" of Tilton's Church and the organizer of its direct mail. In his deposition, Tilton expressed disagreement with some of the things Moore -- a principal witness for Tilton at the preliminary injunction hearing -- said to ABC (Abrams Aff. Ex. 7 at 239-52) -- e.g., Tilton denied Moore deserved credit for his financial success, denied that Response Media's supposed "downtown office" purchased media time for him, etc. What Tilton cannot deny, however, is that ABC believed Moore's account of what he did for Tilton. Tilton therefore cannot show actual malice.

Discovery has, in any event, now confirmed that Response Media did serve as far more than a printer. As Tilton admits, Response Media acted as a consultant to the Church with respect to its mailings. (Abrams Aff. Ex. 7 at 251-32) Moore himself participated in the meetings at which mailing strategies and results were discussed and analyzed. (Abrams Aff. Ex. 14 at 65-77) Response Media created demographic studies for Tilton. (Abrams Aff. Ex. 14 at 135-36) Tilton maintains that Response Media merely printed and sent out his mail and that another company, IDM, received the mail, maintained records, composed and sent responses, and forwarded prayer requests to Tilton. But once again Tilton ignores what is relevant here -- the gist of the report. Under the substantial truth doctrine, it does not matter whether it was employees of Response Media, IDM or the Church itself that composed and processed mailings, compiled the results of mailings, and analyzed which mailings were most effective. The gist of the PrimeTime report was that Tilton utilized a sophisticated direct mail

operation that effectively brought in large amounts of contributions. About this there can be no dispute.[21]

I. Missions and Crusades

ABC reported on Tilton's mission and crusade activities around the world. The gist of ABC's report was that Tilton exaggerated his contributions to such missions in his publicly released -- and trumpeted -- reports. We have already addressed Tilton's having done so with respect to his support of an orphanage in Haiti. The same was true with respect to other missions.

In PrimeTime I, ABC reported (while showing the names of five of Tilton's missions):

> "And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these, his missions around the world. But we tracked down every charitable contribution of Tilton we could find and we calculate he spends more in a year on billboards around Dallas than he does on all of these missions combined."[22]

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[21]For example, Tilton challenges a statement in the report that Tilton's letters to followers were "written by ghost writers." But Tilton does not contend that he writes the letters himself. Kathryn Ingley, the Church's manager of partner correspondence, described herself as a ghost writer for Tilton. (Abrams Aff. Ex. 12) Asked about the role of others, including Jim Moore, in composing the Church's mailings, Tilton testified "I basically had the concept in the letter and then it was their responsibility as subordinates to put it in mailable form." (Abrams Aff. Ex. 7 at 253) It is undisputed that it is not Tilton but rather employees of IDM who review letters from prayer partners and select responses that are then sent out with over Tilton's signature. (Id. at 434-38) Tilton also admits that the books he claims to have authored were in fact written by others. (Id. at 260-61)

[22]In PrimeTime II, the second sentence of this passage was "But we tracked down five of Tilton's so-called missions and we calculate he spends more in a year on billboards around Dallas than he does on these five missions combined."

ABC attempted to get information concerning the Church's mission contributions directly from the Church, but the Church would not provide it. (Gordon Aff. ¶ 56, Sutherland Aff. ¶¶ 12) Tilton admitted in his deposition that the Church did not make information publicly available concerning how much was spent an missions or billboards. (Abrams Aff. Ex. 7 at 559; Ex. 9 at 150)

In the face of the Church's refusal to provide information, ABC did as much as it could to obtain data concerning Tilton's contributions to missions and payments for billboards. The Gordon Affidavit sets forth in detail the results of ABC's investigation and the basis for ABC's comparison of the amount spent on billboards with that given to the five missions pictured during the report.

ABC's report was based on its calculation that Tilton spent $180,000 per year on billboards. Tilton himself has now testified that he spent about $200,000. (Abrams Aff. Ex. 6 at 595) In fact, discovery has revealed that the Church spent over $325,000 in 1991 just for leasing billboard space. (Abrams Aff. ¶ 80)

Nor can there be any dispute that the amount Tilton contributed to the five missions referred to in the broadcasts was less than the amount spent on billboards. Tilton admits that this is true. ABC's calculation based on the information it was able to obtain was $150,000 per year. Tilton's testimony was that the actual number was slightly higher $177,272 -- but in any event indisputably less than the amount spent on billboards.[23]

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[23]ABC was aware of a mission in Ciudad Victoria, Mexico Tilton claimed to sponsor. Because ABC could not determine even an estimate of the size of Tilton's contribution, that mission could not be included in the PrimeTime report. See Gordon Aff. ¶ 91. Again, ABC's investigation could have been made much easier were it not for Tilton's refusal to provide information. It is not surprising that case law is so clear that the failure of a plaintiff to respond to inquiries from the press weighs heavily against a claim of actual malice.

Again, Tilton does not dispute the accuracy of what ABC reported. Instead, Tilton quarrels with ABC's selection of the five particular missions featured in the report. Tilton contends that ABC "intentionally chose to feature missions whose support they believed would be less than Plaintiff's Church spent on billboards in order to convince viewers that Plaintiff lies about his mission support and wastes money sent by his followers on commercial billboards despite knowing otherwise." (Abrams Aff. Ex. 4 at 44) There is no support for that contention. Had ABC had that intent, it would hardly have included Guatemala (to which Tilton contributed over $146,000 in 1991) on its list. (Abrams Aff. ¶ 82) In fact, as the Gordon Affidavit demonstrates, ABC reported on the only missions for which it was able to obtain reliable information. It is more than disingenuous for Tilton to cloak his support of missions in secrecy and then attack ABC for being unable to uncover more information about that topic.[24]

In any event, Tilton's argument rests on the same misapprehension of governing law as is present with regard to all his claims. ABC believed what it reported about the five missions and the billboards to be true, and it was in fact true. Tilton therefore cannot meet his burden of proving falsity or actual malice.

Tilton also challenges the report in PrimeTime II concerning Tilton's support of two particular missions -- the Wings of Mercy center and the mission in Guatemala. With respect to Wings of

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[24]Mrs. Tilton, the head of operations for the Church, summarized its policy of dealing with the press as follows:

> "Q Was there a policy . . . about responding or not responding to queries of journalists?
>
> "A Basically, we did not give information. There was no reason to give information." (Abrams Aff. Ex. 9 at 150)

Mercy, PrimeTime II reported that Tilton contributed a total of $300 a month. Tilton has admitted that his support for Wings of Mercy was indeed $300 per month. His deposition testimony in which he did not know what Wings of Mercy was speaks for itself. The report was true and reported without actual malice.

Tilton also challenges the following passage about Tilton's support of a mission in Guatemala:

> "Sawyer: And what about something else Tilton said in his deposition? He claims that his contribution to his mission in Guatemala is 100 percent of their needs.
>
> Attorney: -- that you were going to provide --
>
> Rev. Tilton: We would be --
>
> Attorney: -- 100 percent of the support that they need to maintain their operation.
>
> Rev. Tilton: Yes, yes.
>
> Sawyer: So we checked this out. We spoke to the onsite missionary in Guatemala who told us, in fact, Tilton is only a partial sponsor."

Tilton did say that he provided 100% of the support for the Guatemala mission.[25] He identifies Hugo Morales as the onsite

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[25]Tilton himself testified somewhat unclearly:

> "Q: Do you know if you contributed 100 percent or not to the mission in Guatemala?
>
> A: It was my original understanding that we would pay for all of that particular budgetary needs. To say did we give him 100 percent of everything they got, I just answered the question, and told you it was my understanding that we were covering all of their budget if someone gave them some extra.

missionary in Guatemala. (Id. at 514) It is undisputed that ABC did speak to Mr. Morales before the PrimeTime II broadcast. During that conversation, which was tape-recorded, Mr. Morales told ABC that he received funding from Tilton through the Don Stewart Association, that he received approximately $12,000 a month from the Don Stewart Association, and that he did not know how much of that amount came from Tilton. Morales said that the money received from Don Stewart paid for the mission's expenses and only 50% of teachers' salaries for his 12 schools. (Abrams Aff. Ex. 15)

As noted above, Tilton would not provide ABC (or any member of the public) information concerning his mission support. In the absence of such access to Tilton, ABC turned to the individual Tilton himself identifies as the onsite missionary and that person told ABC that Tilton did not provide 100% support. Since there is no evidence whatsoever to suggest that ABC did not believe Mr. Morales, Tilton cannot prove actual malice. Moreover, the truth of the report has now been confirmed. In his deposition in this case, Morales admitted receiving $2200 per month in addition to what he received from Tilton:

> "Q. In 1991 and at least part of 1992, you got regular checks of at least $2,200 a month that did not come in any way, shape or form from Robert Tilton; isn't that correct?
>
> A. [through interpreter] Yes, that's correct." (Abrams Aff. Ex. 17 at 34)

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> Q: I'm sorry, at the very end of your last answer you say, 'If someone gave them some extra –
>
> A: If someone gave them some extra money above the 100 percent, that would be 105 percent or 120 percent, which is not unnormal." (Abrams Aff. Ex. 7)

Tilton also challenges PrimeTime II's report of Tilton's invitation to the presidential inauguration in Guatemala:

> "Sawyer: And the Guatemalan government has gone public to say that Tilton and his promotional material exaggerate his contribution for personal gain, including his claim of a special invitation.
>
> Rev. Tilton: [television broadcast] I've been invited to be in the inauguration, the ball, all the celebrations and --
>
> Sawyer: [voice over] That's not true, according to the president's spokesman, Fernando Muniz.
>
> Fernando Muniz: [through interpreter] No. That the president has invited him to attend the inauguration is by all means false, nor does he have any relation with the government. But we cannot take action against a swindler of this caliber."

Fernando Muniz confirmed in his deposition that he was the official spokesman for Guatemalan President Serrano, that President Serrano did not know who Tilton was, and that neither the president nor the government invited Tilton to the inauguration. Muniz explained that Tilton may have received an invitation from an evangelical church in Guatemala, but if he had, that would not have been an invitation from the government. (Abrams Aff. Ex. 16 at 25-26) As Muniz summarized:

> "Q: It was your information, was it not, at the time you spoke to ABC that the government had not invited Reverend Tilton; isn't that true?
>
> A. Yes." (Id. at 67)

Nor can there be any doubt that ABC was justified in reporting that Tilton exaggerated the importance of the invitation he received. The ministry magazine, published by Tilton, had said:

> "The influence of Robert Tilton Ministries in Guatemala has not gone unnoticed. The government is so appreciative of its contribution to the Guatemalan people, it sent Bob Tilton an official invitation last January to attend the inauguration ceremony of the new president, Jorge Serrano." (Sutherland Aff. Ex. 19)

As Mr. Muniz's testimony made clear, however, not a word of the second sentence of that blurb was true: the government was not "appreciative" of Tilton's contributions; it was angry at Tilton's misrepresentations. The government did not send Tilton an official invitation; it denounced him as a "swindler." (Abrams Aff. Ex. 16)

In addition to Tilton's missions, ABC also reported on another activity of Tilton in impoverished nations. In particular, ABC examined a Tilton crusade in India. As ABC reported, Tilton told his followers in the United States about an "evangelism unit" he sponsored in India. As Diane Sawyer reported: "[T]ilton tells his viewers that their donations enable him to win souls around the world. . . . Tilton tells his followers they finance crusades in countries too poor to pay themselves." ABC's report of Tilton's India crusade revealed that at the crusade money was collected from the attendees nightly. As one man who attended the crusade commented on the broadcast: "This is not a crusade, it's a business."

There can be no dispute the crusade in Madras, India was Tilton's crusade. A large sign on the stage read "Robert Tilton India Crusade." The crusade was also referred to in advertisements bearing Tilton's picture as the "Robert Tilton Miracle Festival 1992."

Large signs of Tilton appeared around Madras. Tilton himself preached there on five separate days.

ABC's report was based on information provided to it by J.N. Sharma, a journalist who lives in India and who attended parts of the crusade. Mr. Sharma worked as an independent contractor for ABC News Intercontinental, Inc. As set forth in his declaration, Mr. Jagnath observed Tilton on stage while collections were being taken. At the same time, he observed collections being taken from the attendees in the crowd. (Sharma Aff. ¶ 4)

In addition to his personal observations, Mr. Sharma interviewed Paul Daniel, who attended five days of the crusade and said that collections were taken. Mr. Daniel said that Tilton asked people to give money. Sharma also interviewed Dr. Swaminathan, head of the history department at Presidency College in Madra, who told of Tilton's followers demanding money from people at the crusade.

As set forth in the Affidavit of Robbie Gordon, ABC had every reason to believe in the accuracy of Mr. Sharma's report. Tilton can offer no evidence that ABC knew that any information provided by Sharma was false, or that ABC had any doubts whatsoever as to the accuracy of his reports. Plaintiff cannot prove actual malice with respect to the India crusade.[26]

Nor can Tilton prevail with respect to the substantial truth of the report. Tilton apparently does not contest that collections were

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[26]Nor is there any evidence that Mr. Sharma himself acted with actual malice regarding his report of Tilton's crusade. That fact is not relevant to this motion, however. Because Mr. Sharma was not an ABC employee but rather an independent contractor, ABC cannot be held vicariously liable for any actual malice of Mr. Sharma. See Masson v. New Yorker, 832 F. Supp. 1350, 1369-73 (N.D. Cal. 1993); Secord v. Cockburn, supra, 747 F. Supp. at 787; R. Sack & S. Baron, Libel, Slander, and Related Problems 304 (2d ed. 1994) ("There is no vicarious liability for the 'actual malice' of an independent contractor.").

indeed taken at his crusade. Instead, he asserts that the collections were taken before he began or after he finished preaching, and that ABC's editing of the videotape of the crusade made it appear that the collection was taken while he was on the stage. Tilton's argument thus focuses on Diane Sawyer's observation that ABC had followed Tilton to India and "there was Tilton, passing the collection plates nightly." But, of course, this statement was not meant to be taken as literally as Tilton reads it. Obviously ABC did not mean to report that Tilton himself was going through the crowd passing the collection plate. As anyone who attends religious services knows, that is not the head minister's function. Rather, the gist of the report was that, notwithstanding the poverty of the audience, collections were taken on several nights at the Robert Tilton Miracle Crusade in Madras, India. This Tilton cannot and does not contest.

Tilton also contends that ABC "had no information that Plaintiff took any money out of India." (Abrams Aff. Ex. 4 at 25) But the report did not say anything at all about what Tilton did with the money collected from the crowds.[27]

## III. TILTON'S CLAIMS ARE BARRED BECAUSE STATEMENTS HIGHLY CRITICAL OF HIM THAT CANNOT BE CHALLENGED PRECLUDE RECOVERY FOR HIS REPUTATION

The tort of libel exists to remedy injury to reputation. As the Supreme Court observed, "since the latter half of the 16th century . . . until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory

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[27] PrimeTime II reported: "If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars, money taken from the people he himself calls 'the poorest people on earth.'" (Abrams Aff. Ex. 2 at 171-18) Tilton does not dispute that the crowds at the crusade were sufficiently large -- and composed of the poor -- to make this statement true.

and false." Masson v. New Yorker Magazine, supra, 501 U.S. at 515. It follows that even if the Court were to find that Tilton's claims with respect to any of the many statements he challenges can survive summary judgment, the entire Complaint is still subject to dismissal because Tilton can show no additional damage to reputation caused by those particular statements.

Because so many statements in the broadcasts that cannot be challenged were so critical of Tilton, well-established law requires dismissal of all his claims. Under these cases -- variously referred in the case law as the incremental harm doctrine, the libel proof doctrine, or an application of the substantial truth doctrine -- this Court is required to review the entirety of the broadcasts and determine whether those few statements that may be subject to challenge can possibly be said to have caused any harm beyond that caused by statements that are not actionable because of their truth or any other reason. As the Second Circuit has explained:

> "[The] doctrine thus measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable."

Herbert v. Lando, 781 F.2d 298, 311 (2d Cir.), cert. denied, 476 U.S. 1182 (1986); see also Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 516-17 (Tex. Ct. App. 1987); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. 1993) ("The rule of substantial truth is based on a recognition that falsehoods which do no incremental damage to the plaintiff's reputation do not injure the only interest that the law of defamation protects."). In Herbert, the Second Circuit held that claims relating to two statements that otherwise might have been actionable were not actionable, in light of

its holding that there was no evidence of actual malice with respect to the other nine statements challenged by the plaintiff. Herbert, supra, 781 F.2d at 312.

So too here. As we demonstrate above, all Tilton's claims should be dismissed because all the challenged statements were true or made without actual malice. Nevertheless, if the Court disagrees with respect to some particular statements, summary judgment still should be granted because Tilton cannot demonstrate -- as he must -- any injury to his reputation based on those statements alone.

## CONCLUSION

Defendants' motion for summary judgment should be granted and the complaint dismissed in its entirety.

Dated: March 28, 1995

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No. 92-C-1032-BU

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON,
an individual,
Plaintiff,

vs.

CAPITAL CITIES/ABC INC., a New York corporation; AMERICAN BROADCASTING COMPANIES, INC., a Delaware corporation; ABC NEWS, INC., a Delaware corporation; DIANE SAWYER, an individual; ROBBIE GORDON, an individual; and KELLY SUTHERLAND, an individual.
Defendants.

FILED

APR 12 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

PLAINTIFF'S BRIEF IN RESPONSE TO

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff Robert G. Tilton ("Tilton" or "Plaintiff") respectfully submits this brief in response to Defendants' Motion for Summary Judgment and their Memorandum of Law in Support ("ABC's Brief") pursuant to Fed. R. Civ. P. 56. Plaintiff incorporates herein by reference his Brief in Support of Plaintiff's Motion for Partial Summary Judgment ("PSJ Brief") (Docket No. 255 or 256), together with the Affidavit of Robert Tilton dated March 30, 1995, ("Tilton Aff.") and the Affidavit of J.C. Joyce dated March 31, 1995 ("Joyce Aff.") with their exhibits submitted with his PSJ Brief filed March 31, 1995. (Docket Nos. 258-261)

## STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS SUBSTANTIAL CONTROVERSY

Pursuant to N.D. LR 56.1(B), Plaintiff contends that a genuine issue exists as to each of the following facts and where applicable the number of the movant's fact that is controverted is set forth[1]:

1. Plaintiff controverts the allegations contained in numbered paragraphs 1 and 2 ("ABC's ¶ 1 and 2) of ABC's Brief. They define the "broadcasts at issue" to be only the "Apple of God's Eye" portions of the entire November 21, 1991 ("PT I") and July 9, 1992 ("PT II") *PrimeTime* broadcasts and the "Follow-Up" portion of the July 9th broadcast. Plaintiff also controverts ABC's definition of the term "Tilton"[2] as including "plaintiff Robert Tilton and his ministry." (emphasis added) At times ABC uses "'Tilton' and his

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[1] Plaintiff will not repeat ABC's self-serving headings that attempt to avoid focusing on the libels that Plaintiff asserts, i.e. "Items from Taiwan" when from the beginning Tilton has only challenged the portion that accuses Tilton of getting "Holy Water" from Taiwan.

[2] The term "Tilton" in quotes will reference ABC's definition. The use of Tilton without quotation marks means the individual Plaintiff, Robert G. Tilton, alone. Each and every time ABC uses "Tilton" that fact paragraph is controverted because only Tilton is the Plaintiff.

Church" or "'Tilton' and his ministry" apparently using "Tilton" to mean only the Plaintiff. Plaintiff's Final Amended Complaint ("Complaint") shows that Tilton brought this action in his individual capacity not on behalf of Word of Faith World Outreach Center Church ("Church"). (Joyce Aff. Ex. 3) The defamatory and false light segments complained do not include all of the "Apple of God's Eye" and "Follow-Up" segments. The specific statements which Plaintiff asserts are libelous and/or portray him in a false light are set out in Ex. 410 to the Affidavit of J.C. Joyce dated April 12, 1995 ("Joyce 2nd Aff.")[3] Only those portions of the broadcast which explain or set up those libels and false light statements are material. Tilton is included with the other two televangelists in the introduction, he is referenced at the end of each of the Grant and Lea segments, and a substantial portion of the Grant segment is devoted to the Bob Jones whom ABC brings into the segment solely on Tilton. Plaintiff also disputes the accuracy of Ex. 1 and 2 of Abrams Aff. referenced in ABC's ¶¶ 1 and 2 respectively. (Joyce Aff. Ex. 1, Ex. VT-1, Ex. 2, Ex. VT-2; Affidavit of Marilyn A. Lashner, PH.D. ("Lashner Aff.") Ex. B at 20-26).

2. Plaintiff admits the statements of material fact contained in ABC's ¶ 3.

3. Plaintiff controverts the allegations contained in ABC's ¶¶ 4 and 5. While there are some accurate quotes, from Judge Brett's decision made prior to discovery, these paragraphs do not set out material facts relevant to ABC's post-discovery motion for summary judgment. ABC's ¶ 4 mischaracterizes the content of Tilton's original complaint which the Court properly set out in its

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[3] Exhibits to Joyce's Second Affidavit are numbered 100 to 423 and VT-J01 - VT-J71. Exhibits to Joyce's Affidavit submitted with Plaintiff's Motion for Partial Summary Judgment are numbered 1 to 78. All the exhibits are submitted solely for the purposes of the Court's ruling on the pending dispositive motions and are subject to future motions in limine, designations of depositions, and evidentiary objections.

Findings of Fact No. 7. Tilton v. Capital Cities/ABC, Inc., 827 F.Supp. 674, 676 (N.D. Okla. 1993). ABC's ¶ 5 omits the Court's qualifying phrase "Plaintiff has not thus far demonstrated . . ." Id. at 681.

4. Plaintiff controverts the allegation of ABC's ¶ 6 that Tilton moved for and was granted leave to amend his complaint after his request for preliminary injunctive relief was denied. Tilton first moved for permission to amend his Complaint on May 21, 1993 (Docket No. 47) prior to the hearing on the Preliminary Injunction.

5. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 7. The only portion that Tilton asserts is false and defamatory is "Tilton uses three different names for his Haiti orphanages," not the remainder of the statement as broadcast. (Affidavit of Floyd Abrams dated 3/28/95 ("Abrams Aff.") Ex. 5 at 13-16; Joyce 2d Aff. Ex 410) Tilton did not use different names to describe orphanages. (Joyce 2d Aff. Ex. 160 at 78-94, Ex. 132 at 83-85) Tilton did not claim that he personally supported an orphanage in Haiti. (Tilton Aff. ¶ 7) ABC cannot produce a single document where Tilton said he did. Whether government officials had or had not heard of Tilton or of any orphanage by any of the "three different names," is not a material fact. (Joyce 2d Aff. Ex. 410; Lashner Aff. Ex. E at 30-33)

6. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 8. The use of "Tilton" as defined by ABC is misleading. PT I did not state Tilton and his ministry "uses three different names . . ." nor that "Tilton claimed to sponsor" an orphanage in Haiti. (Joyce Aff. Ex. 1 at 25) Tilton did not himself use three different names for the Sullivan's orphanage. The "three different names" found in the Church's magazines were the result of Rev. Lee Sullivan dictating reports to Kathryn Ingley. (Joyce 2d Aff. Ex. 160 at 78-94, Ex. 132 at 83-85)

7. Plaintiff controverts the allegations contained in ABC's ¶ 10 as they misrepresent Judge Brett's conclusion stated in Finding of Fact No. 13(c): "The record thus far indicates that the Defendants were making a reasonable effort . . ." and they do not constitute a material fact. Tilton v. Capital Cities/ABC, 827 F.Supp. at 681.

8. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 11 and 12. PT II stated: "it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage." (emphasis added) Tilton never referred to the orphanage in Haiti as "Robert Tilton Ministries' Children's Home" - that phrase was used by Lee Sullivan. (Joyce 2d Aff. Ex. 160 at 85) Neither Tilton or the Church ever claimed to own an orphanage in Haiti. (Tilton Aff. ¶ 7) World Harvest Orphanage was sponsored by the Church. (Joyce Aff. Ex. 9 at 179, 412, 428, Ex. 30, Ex. 31 at 83) ABC knew, before Sawyer went to Haiti, that it was highly unlikely that any government official would have heard of Tilton as it was not "his" orphanage or of World Harvest Orphanage as so few orphanages are registered. *See* PSJ Fact ¶¶ 49, 50. (Joyce Aff. Ex. 42, Ex. 43, Ex. 243-251).

9. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 13 and ¶ 15. The "canvas sign" did not bring to mind Bob Jones' statements. On July 24, 1991 Gordon wrote Michael Cowan seeking information on Tilton's missions, discussing American ministers, possibly Tilton, coming down, putting up signs to take their picture in front of, and enclosing the "canvas sign" picture from the Church magazine. (Joyce 2d Aff. Ex. 231) Gordon and Sutherland had that "canvas sign" picture with them when they interviewed Jones on September 12, 1991, and led Jones to make the statements "could put up a sign ..." (Joyce 2d Aff. Ex. VT-405, Ex. 405)

10. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 14. The Church, not Tilton, contributed $1200 a month to World Harvest Orphanage plus additional sums. (Joyce 2d Aff. Ex. 160 at 23-24, Ex. 411) Neither Tilton nor the Church ever claimed that the Church was the sole contributor. (Joyce 2d Aff. Ex. 161 at 110-111, 115-116).

11. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 16 which although literally accurate are misleading. The only portion of the quoted passage that Plaintiff alleges is libelous is: "There's holy water from the River Jordan. . .though Moore said some of the items come from that holy place, Taiwan" (Abrams Aff. Ex. 5 at 5; Joyce 2d Aff. Ex. 410; Joyce Aff. Ex. 3 at ¶¶ 15, 31-36).

12. Plaintiff controverts ABC's ¶ 17. It does not contain any relevant or material fact. Tilton does not allege those statements were libelous. (Id.)

13. Plaintiff controverts the allegations contained in ABC's ¶ 18 as not material. The Church, not Tilton, mailed the button to its partners (Joyce 2d Aff. Ex. 402.)

14. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶¶ 19 and 20. It was not "almost immediately" after leaving a wall display of the Church's old button mailing, that Gordon asked Moore: "Where do you get all this stuff." While standing at that display, they began a discussion of Anthony's fund-raising for the homeless, accounting, keeping it clean. Then they left that display, went down a corridor and Moore turned into another room when Gordon pointed to a far wall:

RG: [POINTING TO FAR WALL] Is that--

JM: --anything for anybody and we're just a printer. But if we're involved creatively--

RG: Where do you get all this stuff from?

JM: What do you mean? Let me show you in here.

RG: Well, you know, like the buttons. And I just saw you have like water--

JM: Oh, we've got-- we've been doing this for so long that we've, we've got it down to, to science.

RG: You've got storehouses?

JM: Yeah. We get stuff from Taiwan. We get stuff from-- this is American Express where we do a die cut, personalized letter. That's-- We've done a lot of those. Well, you've probably gotten a lot of the mailings we've done. Six Flags, we do all their promotional mailings out of Atlanta (Joyce Aff. Ex. VT-18, Ex. 18 at 55-57).

Clearly Moore was distracted when he answered Gordon's "stuff" question and clearly -- with his Taiwan answer--he was referring to the full set of items displayed in his cases and not specifically to those that may have been used by "Tilton." As Moore was about to mention another locale from which he would "get stuff", he apparently became distracted by the American Express display. (Lashner Aff. Ex. E at 10-11) Moore testified his "We get stuff from Taiwan" had nothing to do with Tilton. (Joyce Aff. Ex. 17 at 233)

15. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶¶ 21 and 22. Moore's "it's possible" testimony is not a material fact. (Joyce Aff. Ex. 17 at 903-906) Examination of the complete tape shows it was not possible that Gordon understood his Taiwan response as claimed because of her subsequent statements. After Moore left the room,

Gordon stated: "I would like to know, just out of curiosity, where they get the-- that Lord's water and a couple of other things." After leaving Moore's premises, Gordon commented: "I don't feel like we've got him nailed right now." and "I really wanted to get him to say that stuff is not from the River Jordan, but I think he. . ." (Joyce Aff. Ex. 18 at 68, 107, 108, Ex. VT-18) "[S]ome of the items came from that holy place Taiwan" was not an ironical observation but coupled with the video picture was made to accuse Tilton of mail fraud. *See* PSJ ¶¶ 26, 28, 29 (Joyce Aff. Ex. 19, Ex. 20, Ex. 21, Ex. VT-21, Ex. 22, Ex. 23) (Joyce 2d Aff. Ex. 394).

16. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 23. Through ABC's use of language, juxtaposition of facts and circumstances, as well as the text/video correlation, the broadcasts did "say" implicitly that the holy water came from Taiwan (Joyce Aff. Ex. VT-1, Ex. VT-2, Ex. 224, Ex. 395; Lashner Aff. Ex. E at 7-13).

17. Plaintiff controverts and contends that a genuine issue exists as to the allegations contained in ABC's ¶ 24. *See* ¶ 14 *supra*. ABC's ¶ 24, even if true as to PT I, is not a material fact as it does not address Gordon's knowledge and beliefs as to the source of the Holy Water sent out by "Tilton." As to PT II, ABC had reason to doubt that information. *See* PSJ ¶¶32, 33. (Joyce Aff. Ex. 24, Ex. VT-24, Ex. 25, Ex. 26, Ex. 28, Ex. 29, Ex. 75)

18. Plaintiff controverts ABC's ¶ 25. The quotation from Judge Brett's pre-discovery finding is accurate, but is neither relevant nor material.

19. Plaintiff controverts ABC's ¶ 26. It is false but it is neither a material fact nor relevant here.

20. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 28 to the extent it alleges that Ole Anthony was a minister. Ole Anthony never told Sawyer or

anyone at ABC or any of the Defendants prior to the PT I that he was a minister (Joyce 2d Aff. Ex. 180 at 409-410).

21. Plaintiff controverts and contends that a genuine issue exists as to as to the allegations in ABC's ¶¶ 29 and 30. They imply that the trash trips were Anthony's idea and he merely kept Gordon informed of his independent actions. Anthony was under the constant direction of ABC and it was ABC's decision to go through the trash in the first place (Joyce 2d Aff. Ex. 189 at 118, 122) Plaintiff denies that ¶¶ 39-49 of Gordon's affidavit are credible. *See infra* at 47. (Joyce 2d Aff. Ex. VT-J36, Ex. VT-J66, Ex. 278, Ex. 400 at 48, Ex. 401, Ex. 310, Ex. 122 at 588-648; Joyce Aff. Ex. VT-1, Ex. VT-2) The only support for what Gordon and Sutherland believed about what Anthony reported is found in their affidavits, both of which Plaintiff challenges for lack of veracity and credibility. Id., *see infra* at 47-48, 51-52. (Joyce 2d Aff. Ex. 173 at 74-75, 78, Ex. 172 at 7-8, 41, 51, Ex. 162 at 43-44, Ex. 160 at 8) If Gordon and other ABC personnel did not personally take part in the "trash runs," ABC's statement "We found them" by itself is a lie. (Gordon Aff. at ¶¶ 43, 44, 46, 47; Sutherland Aff. ¶ 11)

22. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶¶ 31, 32 and 33. They are not material facts nor relevant to any libel Plaintiff complains of. What is relevant and material is set out in PSJ Fact ¶¶ 55-67. Defendants never found any prayer requests "in the garbage at the Bank and the marketing research center" which had been put there by the Bank or the "marketing research center." *See* PSJ Fact ¶ 60 (Joyce Aff. Ex. 49-54; Joyce Aff. Ex. 104 at 921-970) ABC did not show "items people had been prayed over and sent in" during Sawyer's voice-over statement. *See* PSJ ¶ 59 (Joyce Aff. Ex. VT-1, VT-48)

23. Plaintiff admits ABC's ¶ 34 to the extent that it includes an accurate quotation of the Brenda Reynolds' interview presented on PT II. Plaintiff controverts and contends that a genuine

issue exists as to the allegations that Reynolds' information was correct and asserts that ABC presented her interview to place Tilton in a false light. Gordon and Sawyer knew what Mrs. Reynolds' statement "I knew for a fact that he did not pray over them" could not be true because they knew she was not with Tilton enough hours of the day or days of the week to know.

24. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 35. At the time PT I and II were broadcast, the Church had a well thought out and conceived computerized mail program in which partner mail sent to Dallas, Texas, was forwarded unopened to Commercial Bank and Trust Company in Tulsa, where any money gifts were removed, all envelopes and contents, excluding the money gifts, were delivered to IDM in Tulsa where appropriately trained personnel read each letter, recorded it, prepared and sent an appropriate response as instructed, and then all prayer requests were sent daily to Pastor Tilton to pray over. Tilton v. Capital Cities/ABC, 827 F.Supp. at 678. There are no pages 560-561 in Plaintiff's copy of Ex. 6 to Abrams Aff. and examination of the referenced testimony at those pages does not relate to ABC's ¶ 35.

25. Plaintiff controverts ABC's ¶¶ 36-43 as not relevant to any libel set forth in the Complaint and not asserting any material facts. (Joyce Aff. Ex. 3) IDM sent everything in one mailing and the envelopes were addressed to "Word of Faith World Outreach Center Church, Inc., Robert Tilton, P. O. Box . . ." (Abrams Aff. Ex. 19) Tilton testified that prayer requests on P-21Bs and P-21Cs forms were transferred to a computer printout and sent to him in Dallas where he prayed over those prayer requests. (Abrams Aff. Ex. 6 at 374-75, 377) Lester's and Reagan's P-21B forms were found at the recycling center - not at the Bank or the marketing research center (Abrams Aff. ¶¶ 32, 28); Connors testified "20 or 30 per cent" didn't have prayer requests. (Abrams Aff. Ex. 10 at 745)

The testimony referenced for ABC's ¶ 37 does not support that paragraph. Pages 566-72 referenced in ABC's ¶¶ 42 and 43 are missing from Plaintiff's copy of Ex. 6 to Abrams Aff. but the testimony at those pages shows that Mr. Abrams recognized that Tilton testified the substance of the prayer requests was transferred to computer printouts for prayer and that Tilton testified that while he did not receive the actual white mail documents, he did pray over the prayer requests contained in those documents which were transferred to computer printouts (Joyce Aff. Ex. 102 at 566-71).

26. Plaintiff controverts ABC's ¶¶ 44, 45, and 46 and denies they are relevant to any libel set forth in the Complaint or assert any material facts. (Joyce Aff. Ex. 3) The procedure strictly followed by IDM employees with regard to mail was that if it had any prayer on it, it would be sent to Dallas for Pastor Tilton to pray over. (Joyce 2d Aff. Ex. 139 at 174; Ex. 394 at 230-231, 246, 299, 316-317, 355-356; Ex. 115 at 26-27; Ex. 135 at 19-21) All of the prayer requests referenced in ABC's ¶¶ 45 and 46 were sent to Tilton to pray over and he did lay his hands on and pray over them. (Joyce 2d Aff. Ex. 167 at 109, 122-123; Ex. 168 at 173, 200, 205, 213-214) Neither of those mailings were one of the 37 mailings ABC claims they found "in the garbage at the Bank and the marketing research center." (Joyce 2d Aff. Ex. 423)

27. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 47. While it is a generally accurate quotation from PT I, none of it except the underscored sentence is material. Montcalm and others at AT&T were not "asked to pose as Tilton prayer ministers" (Abrams Ex. 5 at 3 and 24; Joyce 2d Aff. Ex. VT-J25, Ex. VT-J29, Ex. VT-J34, Ex. VT-J67, Ex. 259-267).

28. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶¶ 49-53. They do not contain any material fact. AT&T employees were taking overflow calls,

were directed not to pray for anyone and were never asked to pose as prayer ministers. (Joyce 2d Aff. Ex. 266) Tilton does not allege that anything Montcalm said on the broadcast was false or libelous, he does assert that what Diane Sawyer said, "she and others were asked to pose as prayer ministers," was false and libelous. (Abrams Aff. Ex. 7 at 399, Ex. 5 at 3 and 24) Montcalm did not state that she was asked to pose as a prayer minister. (Joyce 2d Aff. Ex. 403, Ex. VT-403, Ex. 404, Ex. VT-404)

29. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶¶ 54-59. The backlit segment did not report on Tilton's college days but on Taylor's. Taylor was not a college "friend" of Tilton's. *See* PSJ Fact ¶¶ 3-22. (Lashner Aff. Ex. E at 14-18) Tilton never imitated preachers while in college as Taylor claims, whether drinking or not. (Joyce Aff. Ex. 9 at 538; Joyce 2d Aff. Ex. 102 at 539) The transcript of the uncut Taylor interview upon which ABC relies is inaccurate. Compare Gordon Aff. Ex. 18 to Joyce Aff. Ex. VT-5 and Ex. 5. None of the "attending revivals" happened at any time when Taylor knew Tilton but in 1963:

> Q. You mentioned that on at least one occasion you actually went to a revival meeting. How did that come about in the group? Do you remember?
>
> A. Yes. It was during the summer of '63, and we had had a party that afternoon..
>
> Q. And just so -- so that we'll be clear, you never made the acquaintance of Robert Tilton during that period of time?
>
> A. I don't remember him, no.

(Joyce 2d Aff. Ex. 141 at 12-14, Ex. VT-141) Taylor's "we" was not referring to Tilton. (Lashner Aff. Ex. E at 15-16) Gordon pushed Taylor to get the kind of answers she wanted regarding Tilton

and he sometimes refused to do so. McLeod refused to verify that Tilton was ever at the tent. (Joyce 2d Aff. Ex. 141 at 12-14) Examination of the raw footage compared to the broadcast shows Gordon created the whole segment and falsely edited it to make it appear that Taylor was talking about Tilton when he used "we" (Joyce Aff. Ex. 1, Ex. VT-1, Ex. 2, Ex. VT-2, Ex. 5, VT-5).

30. Judge Brett concluded at the Preliminary Hearing that "one implication of [Taylor's] talk is the entire Tilton ministry is nothing more than a carrying out in the future of their early fraudulent plans." (Joyce 2d Aff. Ex. 104 at 1111) Later Judge Brett recognized that the silhouetted man in the broadcasts was describing actions he and Tilton took and concluded "Implicit in [Taylor's] statements is that Tilton and his present evangelistic organization stems from this insincerity and is essentially a scam." *See* Order of February 1, 1994, at fn. 1. (Docket No. 152)

31. Plaintiff admits ABC's ¶ 60 is a an accurate quotation from the Beebe segment of PT I and II which followed the last part of the Back-lit Man segment where Sawyer says "But he never tells followers how he and his friend talked about running preacher scams and cashing in." (Joyce Aff. Ex. 1 at 27, Ex. 2 at 21) The gist and sting of that segment is set out in Ex. 410 of Joyce 2d Aff.

32. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 61. They are misleading. The referenced news article does not appear to have been produced by ABC in response to Plaintiff's requests for all documents related to their investigations of Tilton and his Church as it carries no Bates numbers. Gordon does not assert that she reviewed that article prior to the broadcasts. (Gordon Aff. ¶ 78) That article did not report that Beebe "had links to organized crime" (emphasis added) but merely stated that he had associations with individuals who have organized crime connections as is clear from Gordon's Aff. ¶ 78. Tilton testified that he "now believe[s]" that Beebe was involved in

organized crime according to the press and what he had been told. (emphasis added)(Abrams Aff. Ex. 7 at 439) At the time of the "Beebe loan" Tilton had not heard anything about Beebe or his organization being criminal, that came out several years later (Abrams Aff. Ex. 7 at 444).

33. Plaintiff admits ABC's ¶ 62 is substantially true in stating that the Church was seeking and was granted the loan but it is not relevant to the libel Plaintiff has asserted and therefore contains no material fact. The broadcasts stated Beebe's banks gave Tilton the loan.

34. Plaintiff admits the allegation of ABC's ¶ 63 that the loan documents were executed in April 1980 but controverts and contends that a genuine issue exists as to the remainder of that paragraph as it mischaracterizes Tilton's testimony. Tilton testified that Beebe agreed to grant the loan to the Church during their first meeting and then referred the Church to the Dallas-Fort Worth Airport Bank. (Joyce 2d Aff. Ex. 169 at 440-441) Tilton phoned Dale Anderson possibly three times inquiring about the Church loan and was again referred to the Airport Bank. (Id. at 447-449) It was the president of the Airport Bank that Tilton had to call numerous times before the initial disbursement of $100,000 was made to the Church. Eventually, the Church received the full amount of the loan. (Id. at 449) Later, Tilton on behalf of the Church contacted either the Airport Bank or Beebe's insurance company to borrow some money to buy the Bent Tree house but that request was denied. (Id. at 445-446) Tilton testified he never talked to Beebe on the phone. (Id.) The Beebe segment also falsely implies that Tilton hit the big time as a result of the "Beebe loan." By 1981, Tilton and his Church were in debt and were incurring more debt. Tilton mortgaged everything he and the Church had to get on TV. The money borrowed from Beebe's bank went to build the Church. The Church paid the Beebe loan with other loans and was deeper in debt

afterwards. (Joyce 2d Aff. Ex. 409) There were also contemporaneous numerous small loans which show the precarious financial position of the Church in 1981. (Joyce 2d Aff. Ex. 413)

35. Plaintiff admits the first sentence in ABC's ¶ 64 but controverts and contends that a genuine issue exists as to the second sentence as based on hearsay and as not relevant. (Gordon Aff. ¶ 77) Tilton does not dispute that the news article stated "Tilton declined to be interviewed, but said through a spokeswoman that he never met Beebe." Tilton does assert that ABC's broadcast statement "though Tilton claims he never met the man" is false and libelous. (Abrams Aff. Ex. 4 at 43, Ex. 5 at 34)

36. Plaintiff controverts ABC's ¶ 65 to the extent it implies, as PT I and II said in context, that Tilton's cosmetic surgery and permanent wave were paid for with proceeds from the "Beebe loan." The testimony cited for the date of Tilton's surgery does not establish when the surgery was first done even though Mr. Abrams knew the date was November 7, 1989. (Abrams Aff. Ex. 7 at 377-79, Joyce 2d Aff. Ex. 147 at 23-24) The testimony cited for the date of Tilton's permanent wave does not establish any date. (Abrams Aff. Ex. 7 at 582) ABC had Church magazines which would establish, at least generally, that Tilton did not have a permanent wave until after January 1989. (Joyce 2d Aff. Ex. 397) ABC has not shown that they had evidence prior to the broadcasts that tied Tilton's surgery or permanent wave to the "Beebe loan." *See* ABC's ¶¶ 60-67 and referenced affidavits and exhibits.

37. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 66. The broadcasts describe Jim Bakker as Tilton's "good buddy." The referenced paragraphs of Abrams affidavit are all based on information not known to ABC prior to the broadcasts and do not support the broadcast statement that Bakker was a good buddy of Tilton's and are in fact misleading. (Abrams Aff. ¶¶ 55-58) The facts that the Church's programs had

been broadcast on the PTL network; that Tilton appeared on Bakker's programs twice and attended the dedication of the Heritage, U.S.A., Grand Hotel; that in ten years Bakker sent Tilton a thank-you note dated February 9, 1983, Bakker's family sent Tilton a Christmas gift in December 1993, Tilton sent a thank-you note and a gift in response on December 30, 1993, and that Bakker's daughter wrote to Tilton on Bakker's release from prison; and that Bakker called a fellow minister, Tilton, to encourage him, do not establish that Tilton was a "good buddy" of Bakker. (Abrams Aff. ¶¶ 55-56, Ex. 7 at 85-86, 88, Ex. 47, Ex. 48; Joyce 2d Aff. Ex. 167 at 85-88) Mr. Abrams affidavit states at ¶ 58: "Tilton testified that he gave Bakker a plaque which had $1,000 bill enclosed in plastic" and cited Abrams Aff. Ex. 7 at 86. However, on the next page (87) of Tilton's deposition, (Joyce 2d Aff. Ex. 167 at 87) he makes it clear that it was the Church that gave Bakker's ministry a plaque with a $1,000 bill at the Grand Hotel dedication, obviously before Bakker's conviction. Page 87 is not included in Ex. 17 to Abrams' affidavit. On June 9, 1994, the Church donated $1,000 to Bakker's daughter's ministry, New Covenant Church. (Abrams Aff. ¶ 58, Ex. 50, Ex. 51, Ex. 7 at 88) Tilton never visited Bakker in his home and never made personal gifts to Jim or Tammy Bakker. (Joyce 2d Aff. Ex. 167 at 87-89) Tilton never knew Bakker as a personal friend but as a minister. (Abrams Aff. Ex. 7 at 89)

38. Plaintiff controverts and contends that a genuine issue exists as the allegations in ABC's ¶ 67. Gordon's credibility is at issue. *See* ¶ 21, *supra.* (Joyce 2d Aff. Ex. VT-J69)

39. Plaintiff controverts ABC's ¶ 68 as it does not state a material fact. The only libels asserted by Plaintiff out of the portions referenced were Sawyer's statements regarding the parsonage: "But could this be the 'parsonage,' in swank Rancho Santa Fe, California, a (PT I: four point five, PT II: multi-) million dollar lake view home. . . . Or is this the parsonage, in Fort

Lauderdale, Florida . . ." (Joyce 2d Aff. Ex. 410; Abrams Aff. Ex. 4 at 38-41, Ex. 5 at 25-26)

40. Plaintiff controverts ABC's ¶¶ 69-70, 72-78 as not containing any facts relevant to any libel asserted by Plaintiff and therefore not stating any material fact. (Joyce 2d Aff. Ex. 410)

41. Plaintiff admits ABC's ¶ 71 if it is understood to mean that Tilton personally purchased the referenced home and boat. ABC knew that prior to *PrimeTime* I as they showed the loan authorization during the broadcast. (Joyce Aff. Ex. VT-1)

42. Plaintiff contends the following genuine issue exists. Prior to the broadcast of PT I, ABC knew that Tilton was not living in the Rancho Santa Fe house, that he was living in a leased house on Krohn Court while the Church's new parsonage in Los Colinas was being remodeled, and that the Florida house and boat were personally owned by Tilton and his wife. (Abrams Aff. Ex. 4 at 51-52, Ex. 5 at 43, 44; Joyce 2d Aff. Ex. 205, Ex. 24, Ex. 269, Ex. 270) ABC showed all four houses. (Joyce Aff. Ex. VT-1, Ex. VT-2) While Sawyer asked "Could this be the 'parsonage'" ABC showed the Rancho Santa Fe house he had moved out of so it was no longer a parsonage, and Tilton's Florida house, also not a parsonage. *See* Joyce 2d Aff. Ex. 410.

43. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 79. Moore never indicated in the interview that he had performed such services for Tilton and ABC cites no evidence to support that allegation. (Joyce 2d Aff. Ex. 144 at 135-137, Ex. 18, Ex. VT-18)

44. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶ 80. Moore did not claim credit in the interview for Tilton's financial success. Plaintiff disputes the accuracy of ABC's transcript of the Moore interview

proffered to the Court as Gordon Aff. Ex. 7. (Joyce Aff. Ex. 17 Ex. 18, Ex. VT-18)

45. Plaintiff controverts and contends that a genuine issue exists as to as to the allegations in ABC's ¶ 81. Moore actually said in response to Anthony's questions:

> OA: Are-- now, do-- now, do you do the time buying for that kind of stuff?
>
> JM: No, and Bob-- we-- a friend of mine-- see, I used to do all the media buying at, at Oral's when I was there. And a friend of mine that used to work there, I had him do the media buying for him initially to get him started. Then we are doing it here in Tulsa, but out of the downtown office (Joyce Aff. Ex. 18 at 92).

Contrary to the assertions in ABC's ¶ 81, Moore clearly told them he did not do the time/media buying for Tilton and Moore said "the downtown office" not "Response Media downtown office." Moore did not say "I used to do all the media buying at the beginning" as asserted in Gordon's affidavit at ¶ 26 supposedly based on ABC's transcript at the cited page 176 of Ex. 7 to Gordon's Aff. - that page 176 does not have the word "beginning" but "[INAUDIBLE]." Moore subsequently testified that first Paul Cole, then his friend Arne Schanke, and then Hal Watts out of J.C. Joyce's downtown office did the media buying for the Church. (Joyce Aff. Ex. 17 at 73-76, 181-182)

46. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 82. ABC knew Moore didn't ship filled in "prayer requests" for Tilton to pray over. (Joyce 2d Aff. Ex. 180 at 449)

47. Plaintiff controverts ABC's ¶ 83 as not material.

48. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶ 84. Moore testified that he was a technical advisor involved in layout, the design of envelopes, color, graphics, sometimes obtaining items to be included, but he was not involved in the drafting of letters. (Joyce 2d Aff. Ex. 144 at 80-83, 86, 94-95) Tilton was responsible for the content of the letters themselves. (Joyce 2d Aff. Ex. 36 at 53-55, 100-114; Ex. 144 at 79-88; Ex. 169 at 99)

49. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶ 85. They are misleading. Moore testified at his deposition that only one time did Response Media prepare a profile of the Church's mailing list and the Church never utilized that information. (Abrams Aff. Ex. 14 at 135-136) ABC did not have that information prior to their broadcasts as Plaintiff produced the documents used as their exhibits.

50. Plaintiff asserts that a genuine issue exists concerning additional statements in the Moore interview segment of the broadcasts which are false or portray Tilton in a false light which ABC has not included. *See* Abrams Aff. Ex. 4 at 37-38, Ex. 5 at 25-26 and Joyce 2d Aff. Ex. 410 at ¶ 7, 15.

51. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶ 86. While literally true, it misrepresents what PT I and II said that Plaintiff asserts is libelous and/or false light. (Abrams Aff. Ex. 4 at 54-57, Ex. 5 at 30-33; Joyce 2d Aff. Ex. 410 at ¶ 8) The gist of both broadcasts was understood as accusing Tilton of misleading his followers concerning his support of missions and denigrate the amount of his support. (Joyce 2d Aff. Ex. 410, Ex. 420, Ex. VT-J70, Ex. VT-J71) ABC knew prior to broadcast those statements were false. (Joyce Aff. Ex. 34, Ex. VT-34, Ex. 35, Ex. 36, Ex. 73, Ex. 74; Joyce 2d Aff. Ex. 229, Ex. 230, Ex. 231, Ex. 235, Ex. 236, Ex. 237, Ex. 241, Ex. 242, Ex. 243, Ex. 303, Ex. 307, Ex. 309, Ex. 321, Ex. 397)

52. Plaintiff controverts ABC's ¶¶ 87 and 88 as not material facts. The Church contributed $300 month to Wings of Mercy. (Abrams Aff. Ex. 6 at 594)

53. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶¶ 89 and 90. Tilton did not "claim to be a 100% sponsor of a mission in Guatemala." Tilton's testimony at the referenced video deposition in Morales is clear. *See* PSJ Fact ¶ 82. (Gordon Aff. Ex. 30 at 170-171)

54. Plaintiff admits ABC's ¶ 91 to the extent it accurately quotes from the Church's magazine which but contends a genuine issue exists as to their interpretation. Prior to PT II ABC had the Church's magazine which stated that the government of Guatemala sent Tilton an invitation to the inauguration ceremony. (Sutherland ¶ 45, Ex. 19) ABC also had the videotape of the *Sunday Morning Live* broadcast on which Tilton stated only: "I've been invited to the inauguration, the ball, all the celebrations and - . . ." (Joyce 2d Aff. Ex. 414,Ex. VT-414) Neither the Church magazine nor the Church broadcast claim that the President of Guatemala invited Tilton or that he was a friend of the President. (Joyce Aff. Ex. 410 ¶ 23) The inauguration segment branded Tilton as a liar. (Joyce 2d Aff. Ex. 410; Lashner Aff. Ex. B at 39-41; Abrams Aff. Ex. 4 at 16-17, Ex. 5 at 48-50)

55. Plaintiff controverts and contends that a genuine issue exists as to the allegations in ABC's ¶¶ 92 and 93. Prior to the broadcast of PT II, Michael Cowan, an associate producer of *PrimeTime*, wrote in Spanish to Fernando Muniz, a public relations spokesman for the President of Guatemala, and enclosed a copy of the Church's magazine written in English containing the material quoted in ABC's ¶ 91. (Sutherland Aff. ¶ 46, Ex. 20) Cowan also referenced and enclosed a letter in Spanish to Guillermo Gonzalez (the President's secretary) "which explains the importance" of the magazine article which stated: "In this article, Senor Tilton talks

about his alleged relationship with President Serrano and also of the alleged support which he is receiving from the Guatemalan government." - an exhibit not included by ABC. (Joyce 2d Aff. Ex. 306. Ex. 406) Cowan made notes which show questions for the Muniz interview being drafted in which the word "president" was substituted for "government" and an accurate paraphrase of the magazine blurb was crossed out in favor of an inaccurate rendition. (Joyce 2d Aff. Ex. 301) Those questions were later typed and faxed on June 19, 1992, to Eddie Evans who conducted the interview. (Joyce 2d Aff. Ex. 299) ABC's interview of Muniz focused on whether the President invited Tilton, whether the President knew Tilton's work personally, whether the President appreciated Tilton's work. (Sutherland Aff. Ex. 21 [Intv transcript]) Muniz answered in the negative but added "eventhough it is probable that some international relations official of our party, something like that, a minor official, has begun a relationship with this man, ...." (Joyce 2d Aff. Ex. 298, Ex. 417) Muniz testified there were at least five groups that gave out invitations printed by the prior government in addition to the president and the congress. (Joyce 2d Aff. Ex. 417 at 24-86) Harold Caballeros obtained the invitations he handled from one of the five groups, "the external foreign relations office possibly." Id. Hugo Morales believed that Caballeros sent the invitation to Tilton and testified that the President's personal pastor picked Tilton up at the airport. (Joyce 2d Aff. Ex. 146) Although Muniz reads English "a little," he had the translator translate Cowan's letter for him. (Joyce 2d Aff. Ex. 417 at 28) Muniz had no information about Tilton other than what ABC had conveyed to him when he talked to President Serrano and he did not recall the Church magazine article. (Joyce 2d Aff. Ex. 417 at 34-35) Tilton had an official invitation and his producer was provided with a governmental press pass. (Joyce 2d Aff. Ex. 415, Ex. 416, Ex. 418) *See* Joyce Aff. Ex. 410.

56. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶ 94. The India Crusade segment as broadcast shows ABC created what was shown on the broadcast from the uncut video footage Sharma sent ABC. *See* PSJ ¶ 68. (Joyce Aff. Ex. 2 at 27-28, Ex. VT-2, Ex. VT-59 Joyce 2d Aff. Ex. 410) Gordon and Sutherland provided Sharma with directions for the type of video footage and information ABC wanted from him (Joyce 2d Aff. Ex. 310, Ex. 311, Ex. 312, Ex. 314, Ex. 316, Ex. 317) Sharma was acting within the scope of his employment by ABC. (Sharma Aff. ¶ 1)

57. Plaintiff controverts ABC's ¶ 95 as not a material fact.

58. Plaintiff controverts and contends that a genuine issue exists as to the allegations of ABC's ¶ 96. ABC's raw footage shows a lady worker with a green bag taking up a collection but Tilton was not preaching or on the platform. (Joyce Aff. Ex. 59, Ex. VT-59, Ex. 58; Joyce 2d Aff. Ex. 320 at 2-3) Tilton was not present when crusade offerings were taken up. (Joyce Aff. Ex. 60, Ex. 61 at 27-28, Ex. 62 at 64-65) The offering taken up was completely independent of Tilton or his Church and was for the benefit of the native pastors. (Joyce Aff. Ex. 60, Ex. 61 at 27-28, Ex. 78 at 169-70, 177) Neither Tilton nor his Church received any money from the India crusade. (Joyce Aff. Ex. 63) ABC had no evidence that any money collected by other ministers at the India crusade went to Tilton. (Joyce Aff. Ex. 8 at 242-243) *See* PSJ ¶¶ 70-79.

59. Plaintiff controverts ABC's ¶ 97 as not stating any material fact and neither proving or disproving actual malice or any libel. (Joyce 2d Aff. Ex. 410) Plaintiff refers the Court to ¶¶ 33, 54, 68, and 89-91 of PSJ Brief.

60. Plaintiff asserts there is a genuine issue as to the following. Prior to PT I, Tilton and the Church became aware of the "investigation" and the possible TV expose although Tilton was never personally contacted. Sutherland contacted the Church and the Church's attorney requesting an on-camera interview. During the course of several telephone conversations, the Church's attorney, at Tilton's direction, informed Defendants that Tilton would not appear, but would review *PrimeTime*'s material and inform ABC of any errors or falsity in their report and to furnish any documents necessary to prove the errors. The Church's attorney further offered to enter into a written agreement that regardless of content neither Tilton nor the Church would attempt to enjoin the publication of *PrimeTime*, but if the broadcast contained false material Pastor Tilton would seek redress after publication. Defendants refused to provide Pastor Tilton or the Church with the program content they intended to present or to allow him an opportunity to refute any charges of wrongdoing. (Joyce Aff. Ex. 3 at ¶ 23; Tilton Aff. at ¶14, Sutherland Aff. ¶ 38)

61. Plaintiff controverts and contends that a genuine issue exists as to as to the allegations in ABC's ¶ 98. Plaintiff is filing motions to strike most of the affidavits of Abrams, Gordon, Sawyer, Sutherland, Jagnath and Kaplan. Credibility of the affiants is an issue for the jury. *See infra* at 44.

62. Plaintiff asserts there is a genuine issue as to the following. After PT I aired, Tilton appeared on the November 22, 1991, *Success N Life* program and responded to the accusations made in that broadcast. Defendants' allegations against Tilton were also refuted on the Church's December 1, 1991, *Sunday Morning Live* broadcast. The December 1 broadcast was not only taped by ABC but was brought to the attention of Rosen, Porges, Barzilay, Chatillon and perhaps others as noted in Rosen's December 2, 1991 memo to Porges. (Joyce Aff. Ex. 24, Ex. VT-24, Ex. 25) In

identical letters dated June 23, 1992, to Sawyer c/o Jonathan Barzilay and Frederick Pierce, then president of ABC, Tilton advised that the allegations leveled by PT I regarding the Holy Water, the Haitian orphanage, and finding prayer requests in the trash "at the Bank and the marketing research center" were false and, as proof, enclosed the trial transcript and exhibits from Morales which showed that the Holy Water came from the River Jordan, that the Church supported World Harvest Orphanage, and that there never were "thousands" of prayer requests thrown in the trash. Sawyer's copy contains handwritten notes of Sutherland, establishing that Defendants received and were fully aware of the letter and its enclosures (Joyce Aff. Ex. 26, Ex. 75, Ex. 28, Ex. 29) *See* PSJ ¶¶ 33, 54, 68.

63. Plaintiff asserts there is a genuine issue as to ABC's reliance on Ole Anthony whom ABC knew was totally untrustworthy and obsessed with his crusade against Tilton. (Joyce Aff. Ex. 64)

64. Plaintiff asserts there is a genuine issue as to the handwritten notes, apparently Gordon's, which show intent: "I think the weak link in the Tilton piece is we never make clear that Tilton's siphoning $ for lavish lifestyle is what Bakker got slammed for. I guess we can do it w/ Pickle - but we need to mk it clear -" (Joyce Aff. Ex. 210)

65. Plaintiff asserts there are a genuine issues of material fact as to the statements set out in the Complaint which Plaintiff asserts are libelous and/or portray him in a false light which ABC's Statement fails to address. *See* Joyce Aff. Ex. 410, ¶¶ 1-3, 7, 10, 17, 18-21.

66. Plaintiff asserts there are genuine issues regarding ABC's use in both broadcasts of a video clip from Plaintiff's church service during the teaser or the studio spot immediately preceding the Tilton segment in juxtaposition with a clip of W.V. Grant and text which ascribed to Tilton the tricks and fraudulent behavior presented

earlier with Grant. (Abrams Aff. Ex. 4 at 64-67; Lashner Aff. Ex. E at 19-20) Gordon's knowledge of and hostility to Tilton's miracle behavior was inconsistent with that brief segment. (Joyce Aff. Ex. 10 at 8)

67. Plaintiff asserts there are genuine issues regarding the nature and amount of damages Plaintiff suffered.

68. Plaintiff asserts there are genuine issues of material fact as to the credibility of Robbie Gordon, Jeff Cooke, Diane Sawyer, Kelly Sutherland, Sharma Jagnath and Richard Kaplan. *See infra*, pp. 44-53.

## ARGUMENT AND AUTHORITIES

### I. INTRODUCTION

By way of introduction, it is truly unfortunate that this Court may not rely upon the cases cited by Defendants for the propositions for which they are cited, nor may the Court rely upon quotations offered by Defendants. Defendants consistently and intentionally misquote, mis-cite and misconstrue cases contained within their briefs. Some examples of which regrettably must be pointed out in this brief.

Starting on page 26 and continuing through the first paragraph on 27 of ABC's brief, the attorneys for Defendants seek to prejudice this Court by pointing out what they describe as:

> The level of Tilton's callous behavior towards his followers was for more egregious than anything even suggested by the broadcast.

They then detail a particular mailing that the nonparty Church sent out and concluded by stating: "The secular word which best describes that behavior is fraud." The Court will observe that Defendants did not ask Pastor Tilton a single question concerning this Prayer Mountain mailing at his deposition. Note, the peculiar

wordage where they quote: "Tilton had 'just returned from my Prayer Mountain meeting with God'." but then they add without quotes "in Colorado". The reason Defendants' attorneys did not ask Pastor Tilton about this particular mailing and the fraud that the attorneys accuse him of is that the attorneys knew that if Pastor Tilton had broadcast that particular show from a ship at sea, the Church at Tilton's direction would still have sent the same Prayer Mountain mailing to Tilton's followers who call during that broadcast. The attorneys knew from examination of the Church's mailings that in January of 1988, Pastor Tilton first revealed to his Church partners his prayer mountain. In that January 1, 1988, mailing, Pastor Tilton stated:

> I've never before told you about the special place where I often go for prayer, because it has been just between God and me. But I want to share about it to build your faith for miracles.
>
> It's a place where God's powerful presence fills my entire being...a holy place where His anointing resides to bring miraculous answers to prayer...it's a place I call "Mountainside" . . . (Joyce 2d Aff. Ex. 411)

The attorney knew that Pastor Tilton in the April of 1991, also talked to his partners about his prayer mountain and in that mailing, Pastor Tilton told his partners:

> God has just called me to the mountainside. He has once again beckoned for me to come and meet with Him in that special place of prayer where I have always seen miracles of abundance happen. (Joyce 2d Aff. Ex. 412)

and further in that same letter:

> The Lord has instructed me to go away to that special place of prayer to meet with Him . . . This is almost my secret place of prayer.
>
> I very seldom mention my mountainside place of prayer because it is such a holy, personal location for me. I ONLY GO TO IT WHEN GOD CALLS ME TO COME. Id.

ABC's attorneys knew that special place, that prayer mountain, was known to Pastor Tilton's Church partners. The attorneys knew that special prayer mountain was the mountain that he was telling his partners that he had just returned from and had absolutely nothing to do with the mountain he was at in Colorado. In fact, it was possible that people who were watching him in Colorado could have received their response to their request for the widow's mite while he was still in Colorado and still preaching. It would have been sinine for him to say that he had come down from a place that he was still preaching from at the same time he was answering the mail. The mountain in Colorado was never Pastor Tilton's prayer mountain. The attorneys knew that and that is why they did not ask him about it in his deposition.

The attorneys stated "the secular word which best describes his behavior is fraud." The legal word which best describes the attorneys' behavior is a fraud on the Court. Needless to say, none of these exhibits nor the prayer mountain mailing nor this portion of the ABC's brief has absolutely anything to do with any of the libels or false lights that are asserted in plaintiff's complaint. It is reprehensible that the attorneys would have included this section in their brief in the blatant attempt to prejudice this Court against Plaintiff in this action. It would appear the apple falls not far from the tree.

## II. THE LAW GOVERNING THIS MOTION

### A. The Legal Burden Imposed Upon the Movant.

The Tenth Circuit has consistently followed the standard that, "Summary Judgment must be denied unless the moving party demonstrates its entitlement to it beyond a reasonable doubt." Madison v. Deseret Livestock Co., 574 F.2d 1027, 1037 (10th Cir. 1978), *citing* Mustang Fuel Corp. v. Youngstown Sheet & Tube, 516 F.2d 33, 36 (10th Cir. 1975). *Accord*, National Aviation Underwriters, Inc., v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir. 1977) and Ruhs v. Pacific Power & Light, 671 F.2d 1268, 1270 (10th Cir. 1982). "[T]he movant must demonstrate entitlement beyond a reasonable doubt, and if an inference can be deduced from the facts on which the opposing party might recover, summary judgment is inappropriate." Exnicious v. U.S., 563 F.2d 418, 423 (10th Cir. 1977).

The burdens of proof and presumptions in Rule 56 cases weigh heavily upon the movant:

> It is well-settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test - "no genuine issue as to any material fact" - is a satisfied and that he is entitled to judgment as a matter of law. The movant is held to a stringent standard. Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it. Finally, facts asserted by the party

> opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true.

10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure, §2727 at 121 (1983)("Wright & Miller").

B. Plaintiff's Burden of Proof as to Falsity - "Preponderance of Evidence".

Defendants misstate to this Court the law of Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) and Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587 (Okla. 1982), *cert. denied*, 459 U.S. 923 (1982). Neither of those cases support Defendants' statement that Plaintiff's burden of proving falsity is by clear and convincing evidence.

In Goldwater v. Ginzburg, 414 F.2d 324, 341 (2nd Cir. 1969) *cert. denied*, 396 U.S. 1049 (1970), the court correctly stated the law of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), stating,

> The *Times* decision changed state libel law only to the extent of requiring public officials to prove actual malice with convincing clarity. Other elements of proof . . . need only be proved by a preponderance of evidence -- the burden of proof imposed by [state] law.

In Rattray v. City of National City, 36 F.3d 1480, 1487, (9th Cir. 1994), the Ninth Circuit adopted the holding of the Second Circuit stating:

> According to established practice, all elements of a defamation claim, with the exception of actual malice in the case of a public official, must be proved by a preponderance of evidence. *Devitt, Blackman & Wolff*, Practice & Instructions § 84.08 (4th ed.

1987); *see also Goldwater v. Ginzburg*, 419 F.2d at 341.

In order for Judge Brett's statement to be a correct statement of the law consistent with all the cases cited, there must be a comma inserted where shown by [ ]:

> Because Reverend Tilton is a public figure, he has the burden as Plaintiff of proving his libel claim relative to falsity[,] and actual malice by the heightened standard of clear and convincing evidence. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964); *Carr v. Brasher*, 776 S.W. 2d 567 (Texas 1989); *Miskovsky v. Oklahoma Publishing Co.*, 654 P. 2d 587 (Okla.), *cert. denied*, 459 U.S. 923, 103 S.Ct. 235, 74 L.Ed.2d 186 (1982).

Tilton v. Capital Cities/ABC Inc., 827 F. Supp. 674, 681 (N.D. Okla. 1993). Since not one of the cases cited by Judge Brett stands for the proposition that "falsity" must be proved by clear and convincing evidence, and, in fact, New York Times v. Sullivan is contrary to that position, it is highly likely that the comma should have been included. It is highly unlikely that Judge Brett would have intended to create a new rule of law contrary to Supreme Court decisions in such a cavalier manner.

C. Actual Malice is Provable by Clear and Convincing Cumulative Circumstantial Evidence.

Defendants attempt to convolute the standard to which Plaintiff must adhere to prove actual malice, and misconstrue the standard as being composed of "strict guidelines." The standard for proving actual malice is simple and straightforward, as set forth by the Court in St. Amant v. Thompson, 390 U.S. 727, 731 (1968):

> [E]vidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. (citations omitted).

Therefore, in absence of evidence of falsification, or in conjunction with such evidence, as the case may be, the subjective state of mind of a defendant, or what he or she believed at the time of publication, becomes the center of relevance on the issue of actual malice.

Plaintiff is allowed to prove what Defendants believed at the time of the broadcasts, and therefore the existence of actual malice, by means of circumstantial evidence. "The [plaintiff] can present evidence in the form of cumulative circumstantial evidence, which is often the only way to prove malice in libel cases." Perk v. Readers' Digest Ass'n, Inc., 931 F.2d 408, 411 (6th Cir. 1991), *citing* Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989). There is no particular strict guideline. Defendants cite to Tavoulareas v. Piro, 817 F.2d 762, 794 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 870 (1987), for the proposition, "[D]efamation plaintiffs cannot show actual malice in the abstract; they must show actual malice in conjunction with a false defamatory statement." ABC Brief at 23. We presume this case is cited to lead the Court to believe that a plaintiff may not prove actual malice by cumulative circumstantial evidence. Tavoulareas does not support that position. The point Tavoulareas makes is that a plaintiff cannot prove the

actual malice surrounding a libel with evidence that cannot be connected with that libel.[4]

Defendants focus on what does not constitute evidence of actual malice, but conspicuously ignore those elements that can be used as evidence of actual malice. ABC Brief at 23. After establishing the importance of state of mind in proving actual malice, the Supreme Court in St. Amant stated:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. 390 U.S. at 732 (footnote omitted)(emphasis added).

Actual malice may also be shown through evidence of the following: intentional avoidance of verification, Harte-Hanks, *supra*, 109 S.Ct.

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[4] It is obvious that Defendants intend to try and defend the libels claimed by Plaintiff with evidence that cannot be connected with the alleged libels. An example of such is their intention to use the irrelevant fact that the non-party Church does not send thank-you notes to people who give the non-party Church less than $2.00.

at 2698; deliberate alteration of quotations, Masson v. New Yorker Magazine, 111 S.Ct. 2419, 2433 (1991); the juxtapositioning of plaintiff's statements resulting in statements that were not uttered, Crane v. The Arizona Republic, 972 F.2d 1511, 1523 (9th Cir. 1992); changes made in drafts resulting from discovery of inaccuracy, Masson v. New Yorker Magazine, 960 F.2d 896, 900; evidence of a preconceived story line, Gertz v. Robert Welch, Inc., 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). All of these are present in Plaintiff's proof. Indeed, some of the elements of proof that Defendants advance at page 23 as evidence incapable of supporting a showing of actual malice may be used, in conjunction with other evidence, to prove the existence of actual malice.[5] This approach is consistent with the rule that a libel plaintiff may show actual malice by cumulative circumstantial evidence.

Defendants further contend at page 24 that evidence of Plaintiff's refusal to grant an interview to Defendants prior to broadcast has been shown to make actual malice more difficult for Plaintiff to prove. The cases Defendants cite, in footnote 9, do not support such a proposition. Moreover, factually they are not on point. Their primary authority, Jurkowski v. Crawley, 637 P.2d 56 (Okla. 1981) and Bichler v. Union Bank and Trust Co., 745 F.2d 1006 (6th Cir. 1984), support the position taken in St. Amant: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained [at the time of publication] serious doubts as to the truth of the publication." 390 U.S. at 731.

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[5] *See* Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984), Harte-Hanks, *supra*, 109 S.Ct. at 2686, New York Times v. Sullivan, *supra*, 376 U.S. at 286, and Anderson v. Rocky Mountain News, 15 Media L. Rep. (BNA) 2058, 2060 (10th Cir. 1988) (*per curiam*).

"[F]ailure to investigate before publication, even when a reasonably prudent person would have done so, is not sufficent to establish reckless disregard." Harte-Hanks, 109 S.Ct. at 2696. "Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." Id. at 2698, *citing* St. Amant, 390 U.S. at 731. The Ninth Circuit explained:

> What this means is that a publisher who does not already have "obvious reasons to doubt" the accuracy of a story is not required to initiate an investigation that might plant such doubt. Once doubt exists, however, the publisher must act reasonably in dispelling it. Thus, where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place. Masson, 960 F.2d at 901.

Here, ABC avoided the truth presented in the Morales transcript and exhibits. Even prior to PT I, ABC avoided obtaining the truth about the Church's missions when Cooke failed to ask about the location of the Haiti orphanage or the names of its pastors during his job interview when Mike Groves was talking about that orphanage. (Joyce 2d Aff. Ex. VT-J21) Cowan's notes show intent to avoid finding out anything good about the Church's support of the True's mission in Mexico. (Joyce 2d Aff. Ex. 241)

In both Jurkowski and Bichler, the overall evidence of defendants' investigations (which happened to include attempts to contact the plaintiffs) showed that ***no*** subjective doubt had been raised by those investigations. To take the position, as Defendants do, that these cases place some kind of affirmative duty on libel

plaintiffs to speak with reporters in order to preserve their ability to demonstrate actual malice is not supported by any law. Here, in contrast to cases cited by Defendants, Tilton made "a blanket offer" through counsel to review charges made against him, to provide evidence of any errors, and during several phone calls offered to enter into a binding agreement not to seek to enjoin publication - ABC refused. ABC wanted an interview it could cut and spice.

Defendants cite Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991), Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309 (7th Cir. 1988) and Woods v. Evansville Press Co., Inc., 791 F.2d 480 (7th Cir. 1986), in support of their assertion that "where the plaintiff asserts that publication defames him by implication, the actual malice element requires a showing that the defendants intended the particular implication ascribed by the plaintiff to the article." ABC Brief at 24. The Newton court actually held that the district court "erred in ruling that an interpretation of the broadcast that 'should have been forseen' by the NBC journalists can give rise to liability" since that is an objective negligence test not the subjective test of New York Times which requires that a journalist have realized his statement was false or entertained serious doubt as to the truth of his statement. 930 F.2d at 680. The Saenz court states that a plaintiff claiming defamation by innuendo must show "that the defendants intended or knew of the implications" asserted by the plaintiff. 841 F.2d at 1318 (emphasis added). The Woods court noted that simply because a statement could reasonably be read to contain a defamatory inference did not mean it was the only one that could be drawn or that the publisher intended that inference or even knew his readers would reasonably infer that. 791 F.2d at 487. There the court found there was no evidence the defendants shared the plaintiff's interpretation or intended it; the evidence was insufficient to create a triable issue of actual malice. Id. The Woods court noted the result might have

been different if that was the only reasonable inference and it there was evidence of defendant's ill-will toward plaintiff, i.e. fabrication, surreptitious actions, or invidious intent. Id. at 488. Defendants' next contention, therefore, that "...Tilton's Complaint typically ascribes to the PrimeTime reports meanings that ABC simply did not state or imply. Tilton cannot demonstrate actual malice by mischaracterizing the reports in this manner." is meaningless. (ABC Brief at 25) Once again, Defendants can neither escape liability by resting on their own "professions of good faith." St. Amant, 390 U.S. at 732, nor can they unilaterally declare that their utterances cannot be ascribed defamatory meaning. The law in this jurisdiction is quite clear on this issue:

> Concerning the requisites of libel per quod, the innuendo pleaded must establish "such extrinsic facts as will show that (the words) were intended to be slanderous and were so understood. These averments must by distinctly stated in the inducement and apply to the plaintiff by a proper colloquium with the intended and understood meaning set out in the innuendos."...If it be decided by the court that the words are susceptible of the meaning the innuendo seeks to ascribe to them, then it becomes a question for the jury to determine, under all the circumstances, whether they were intended to mean what the innuendo avers they did."

Professional Asset Management, Inc., v. Penn Square Bank, N.A., 607 F.Supp. 1290, 1294 (W.D. Okla. 1985)

Plaintiff is entitled to prove Defendants' state of mind with regard to the libelous implications of the broadcast by means of cumulative circumstantial evidence.

III. GIST OR STING OF LIBELS

On page 21 of its brief, ABC states: Thus, in order to prevail, Tilton must prove that the "gist" or "sting" of the PrimeTime broadcasts was false. This is a deliberate misstatement of the law. No cases cited by Defendants support that statement by the remotest stretch of anyone's imagination. The law is, in order to prevail, Tilton must prove false by a preponderance of the evidence the gist or sting of the complained of defamatory statements, not that of the broadcast as a whole. Defendants are back on their -"if everything we say for 59 minutes is true, then defamation will not lie when we call you a horse thief in the last minute." That's not the law now, nor has it ever been, nor is there any case which support this absurd position.

It is truly amazing that Defendants would cite Masson, 111 S.Ct. 2419 (1991) since that case is diametrically opposed to the bogus position that they offer. In Masson, the United States Supreme Court held:

> Minor inaccuracies do not mount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." Id. at 2433 (emphasis added)

The Masson Court was never concerned in any regard with the article as a whole or with the gist or sting of the articles as a whole, but was only concerned with the gist, sting or falsity of the particular statements which were alleged to be libelous by the plaintiff. The Masson court continued in the sentence following the above quoted sentence stating:

> [T]he statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Id.

And in talking about alterations of words, the Court stated:

> We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for the purpose of *New York Times Co. v. Sullivan* . . . unless the alteration results in a material change in the meaning conveyed by the statement. Id. (emphasis added)

and continuing as to another issue:

> And if the alteration of petitioner's words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotation might well be critical in finding the words actionable. (emphasis added) Id.

Defendants changed the words and pictures to give different meaning in the case at bar and their action is actionable.

In reading the four additional cases cited by Defendants, Anderson v. Cramlet, 789 F.2d 840, (10th Cir. 1986); Akins v. Altus Newspapers, Inc., 609 P.2d 1263 (Okla. 1977); Oklahoma Pub. Co. v. Gray, 280 P. 419 (Okla. 1929); Crittendon v. Combined Communications Corp., 714 P.2d 1026 (Okla. 1985), the Court will find that there is not one single word in any of those cases which supports ABC's position that it is the gist and sting of the broadcast as opposed to the gist and sting of the defamatory statements which must be addressed.

Similarly Defendants cite to the Court the Masson decision in a less than candid manner again at the top of page 45: "The Supreme Court has held that the alteration of a quotation is insufficient to establish actual malice. Masson v. New York Magazine, Inc., 501 U.S. 496 (1991)." By truncating the Supreme Court's thoughts, and not giving this Court the Supreme Court's

"unless", Defendants changed the entire meaning and ruling of the Masson Court:

> We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, 376 U.S., at 279-280, 84 S.Ct., at 725-725 and *Gertz v. Robert Welch, Inc., supra*, 418 U.S., at 342, 94 S.Ct., at 3008, unless the alteration results in a material changed in the meaning conveyed by the statement. 111 S.Ct. at 2433.

Richard Kaplan, the executive producer in charge of *PrimeTime* Live, was asked at his 30(b)(6) deposition to read from the transcript of *PrimeTime* Live Exhibit #368A:

> QUESTION: Read that for me please. (Referring to Exhibit 368A (PT I transcript attached hereto as Joyce Aff. Ex. 1) starting at page 27, line 3)
>
> ANSWER: "SAWYER: Tilton, who never finished college, admits he was a drug user, but he says he was saved when someone came to his house and explained Christ.
>
> TILTON: "I just changed. I fell in love with everybody!
>
> SAWYER: "But he never tells his followers how he and his friends talked about running preacher scams and cashing in.
>
> FORMER TILTON FRIEND: "We said that when we graduated we would buy a good tent, a dynamite sound system, a good amen section, and fly around the country and get rich.

TILTON: "We sold everything that we had, bought an old ragged tent, a big old truck and travel trailer and we headed out" - that must "be to tell people about the gospel of Jesus."

QUESTION: Okay, that's far enough.

ANSWER: Okay.

QUESTION: On Line 11, the first word, who is the we that's being referred to?

ANSWER: I assume it's this Tilton friend and Tilton.

QUESTION: Mr. Kaplan, if that the facts establish that the former Tilton friend, who we now know to be a man named John Michael Taylor, didn't say we said when we graduated, but, in fact, said, I said", but what was shown on television was the man saying we said, would that be proper editing practices?

ANSWER: How - did that happen?

QUESTION: Somebody did it on purpose is the only way it could happen, Mr. Kaplan.

. . .

ANSWER: No, they took out a "we". They created "we".

QUESTION: Yes, from another part of the broadcast the man said we. They cut the broadcast, have him saying we. You can see him say we when in fact from your raw footage that ain't the way it happened. It was I.

My question is is that proper editing practice?

ANSWER: That would not be proper.

QUESTION: Doesn't that, and wouldn't that, change the entire import of that sentence, to change that "I" to a "we"?

ANSWER: That would change that sentence.

(Joyce Aff. 2d Ex. 133 at 264-266)

Judge Brett, on two separate occasions, recognized that the broadcast "we" meant Taylor and Tilton, first at the Preliminary Hearing:

> THE COURT: . . . something to the effect that he was an old college buddy of Reverend Tilton's and they used to make a lot of Jesus rap talk and attend these tent revival salvation type meetings and carry on a lot of theatrics concerning it and talking about at some point in time maybe they'd get them a tent and go out and make some money in the same way. (emphasis added) (Joyce 2d Aff. Ex. 104 at 1111)

and later Judge Brett described that segment in terms of "he and Plaintiff" and "he and Tilton" taking part in certain actions and concluded: "Implicit in the silhouetted man's statements is that Tilton and his present evangelistic organization stems from this insincerity and is essentially a scam. Order of February 2, 1994 at fn.1 (Docket No. 152).

The Supreme Court in Masson stated:

> And if the alterations of petitioners words give a different meaning to the statement bearing upon their defamatory character, then the device of quotation might well be critical in finding the words

> actionable. 111 S.Ct. at 2433 (emphasis added).

So, too, when ABC deliberately altered the "I" to "we" to make that statement attributable to Tilton they thereby characterized his whole ministry as the carrying out of a scam created by Tilton and Taylor while they were in college.

Richard Kaplan was caught unaware and testified truthfully, at his deposition. The jury will find that his testimony at deposition was true and that his contrived affidavit is false to the extent that it attempts to change his candid deposition testimony. Kaplan's truthfulness is not rectified by Kaplan's Affidavit.

During her deposition, Diane Sawyer made the following statement regarding the change of "I" to "we":

> QUESTION: If you would have known on November 21, 1991 that ABC had edited John Michael Taylor's statement to change "I" to "we" as they did, would still have broadcast that portion of that segment?
>
> ANSWER: I wouldn't have made that edit.
>
> (Joyce 2d Aff. Ex. 154 at 298)

In Gordan's affidavit filed in support of ABC's motion for summary judgment, (Defendants can count on Robbie to lie to anything that they need) Gordon testified:

> Tilton complains of the change in the quote from "I said" to "we said". That change was occasioned by a technical problem with editing at the end point of the quote. (Gordon Aff. at 34 ¶ 75).

That's a bald faced lie and the jury will find that that's a bald faced lie. There is not a "we" contained in the 16 words immediately

preceding that edit. There could hardly be a "technical problem with editing at the end of that quote." Gordon goes on in ¶ 75 to state:

> However, a few minutes later in the out-take of the interview, John Michael Taylor says, "We said if we didn't, if after we graduated, we had a hard time making a living, or if we weren't making the kind of money that we wanted to, that what we should do would be to grab an audience, become a revival preacher and through that means we would be able to get rich."

That quote is three pages later in the transcript of the uncut raw footage of the Taylor interview and in that context, as in all other contexts, when Taylor was referring to "we", he was never referring to Tilton, but he was referring to the group of his friends.

Examination of the complete unedited videotape interview of John Michael Taylor, reveals that when Taylor used the term "we", he was referring to the coterie of friends that did not include Tilton (Joyce Aff. Ex. VT-5 and Lashner Aff. Ex. E at 15-16). Taylor referred to Tilton as a "hanger-on", a "non-entity", "really not of our class", "more or less a youngster compared to the group I ran around with", and as "one who wasn't a great present" and "was never a leader". Throughout that interview, the Court will observe that Taylor makes a point to distinguish between his old college crowd, whom he repeatedly referred to in the first person as "we", and Robert Tilton, whom he repeatedly referred to in the third person as "he". Id.

More intentional deception is found in ¶ 115 on page 51 of Gordon's affidavit:

> "For example, numerous exhibits were submitted and extensive testimony elicited to prove that vials of water -- an item in one of Tilton's mailing -- came

> from the River Jordan, not Taiwan. Since the broadcast had never said the water came from Taiwan, there was nothing to change" (Emphasis added).

Defendants know what is "said" on television is composed of information - statements, inferences and innuendos. Inferences and innuendos may be generated from a variety of mechanisms and rhetorical devices which include: context, which in turn is composed of order and arrangements of parts; transitional terms; qualifications; connotations; slang and colloquialisms; figures of speech; logical structure; techniques of persuasion; and such television production devices as text/video correlation[6], composite editing, graphics teasers and promos.

The relevant portion of the broadcast is a voice-over by Defendant Sawyer in which she says the following:

> "Tilton send out an avalanche of things he asks viewers to send back to him--'miracle prayer cloths' he promises to touch and place upon an altar, cords he says he'll place on the 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing--place your hand there and he'll put his hand there, too. There's holy water from the River Jordan, 'miracle anointing oil'--though Moore said some of the items come from that holy place, Taiwan."

By Sawyer's use of the parenthetical clause, "though Moore said some of the items come from that holy place, Taiwan", and its introductory word "though", specifically naming the two places (the

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[6] I.e., Newscaster to weatherman, "What a beautiful day." The video shows downtown in a thunderstorm. What was "said", that is, the message conveyed to viewers, is the opposite of the words pronounced.

River Jordan and Taiwan), her juxtaposition of the two place names and her careful repetition of the word "holy" which describes only the water and Taiwan, the broadcast "said" that the water came from Taiwan. The use of the word "though" is an adversative conjunction which imparts the speaker's belief in the inherent contradiction of two sets of juxtaposed facts or circumstances which the speaker presents. With reference to the language quoted above, the first set of facts or presentation by Sawyer is of the prayer aids of Tilton, his claims for their holiness and in the case of the water, its origins in the River Jordan. The second set of facts are Sawyer's presentation of Moore's statement, supported by video, which in context "says" that Tilton gets these items, not from the River Jordan and the Holy land, but from that "holy place Taiwan". By using the language and juxtaposition of the facts and circumstances, as well as the text/video correlation, the broadcast "said" implicitly that the water came from Taiwan.

In fact, a newspaper journalist, one of Defendants' peers, after viewing a copy of the broadcast concluded that the holy water came from Taiwan. (Joyce 2d Aff. Ex. 403).

The facts surrounding this specific subject are material, and the spoken words and the images presented are not in question. Their meaning - what was "said" - is clear, and certainly not supportive of Defendants' position. The best that can be said of the statements is that what was "said" is controverted and subject to interpretation by the jury. In Plaintiff's view, the meaning is clear, capable of only one interpretation, and is libelous as a matter of law. (Lashner Aff. Ex. E at 7-8).

While the Holy Water statements were being made, the camera zooms in on a portion of the holy water mailing, (Joyce Aff. Ex. VT-1, Ex. VT-2; Joyce 2d Aff. Ex. 395). Defendants know better than anybody what the broadcast "said" and their statement to the Court in paragraph 115 is false.

The proof of the gists as asserted by Tilton is found in Plaintiff's statement of libels, the news articles, video of news clips, the letters from the partners and the grand jury subpoena. (Joyce 2d Aff. Ex. 410, Ex. 420, Ex. VT-J70, Ex. VT-J71, Ex. VT-J72, Ex. 418)

IV. Libels Asserted by Plaintiff are Not Opinion

At page 21 of ABC's brief, Defendants cite Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587, *cert. denied*, 459 U.S. 923 (Okla. 1982), Miskovsky v. Tulsa Tribune Co., 678 P.2d 242 (Okla. 1983) *cert. denied*. 465 U.S. 1006 (1984), and Metcalf v. KFOR-TV, 828 F.Supp. 1515 (W.D. Okla. 1992). Apparently Defendants are trying to tell this Court that the defamatory statements Plaintiff complains of are just opinions of Defendants, and are therefore, not actionable. If that is not what they are trying to say, it is hard to understand why they included these cases. If that is what they are trying to say, that flat is not the law, and the cases they cite do not support that as being the law. In Milkovich, *supra*, the Supreme Court recognized that lower courts had attempted to carve out a Constitutional opinion exception to libel. 497 U.S. at 3. The issue before the Court was an Ohio court's recognition of a Constitutionally required opinion exception to the application of the Ohio defamation law. Id. at 10. The Supreme Court in Milkovich clearly held that there is no such Constitutional exception to the application of defamation laws and held that there was no Constitutional privilege for opinion. Id. at 20. The Court held that when a statement of opinion contains a factual implication or if a statement of opinion relates to defamatory facts implied by the statement of opinion, that it is actionable. Id. at 19. Defendants do not fully cite the Hepps quote in the Milkovich case, in that they leave out the footnote which is totally explanatory of the Court's statement. The Supreme Court in Milkovich said:

> *Hepps* insures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.[7] 497 U.S. at 20

and footnote[7] states: "We note that the issue of falsity relates to the defamatory facts implied by a statement." The Milkovich Court went on to state:

> Thus where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory matters regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implication or with reckless disregard of their truth. Id. at 20.

The Court then found that the opinion expressed had implied an assertion of criminal conduct and was actionable. Id. at 21. That is the same thing that we have before this Court. There is clear implication of criminal conduct and that implication of criminal conduct is actionable. The Milkovich Court also stated:

> [W]e have regularly acknowledged the "important social values which underlie the law of defamation" and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Id. at 22 (citations omitted).

Miskovsky v. Tulsa Tribune Co., *supra.*, a case cited by Defendants, does in fact contain this statement when referring to alleged defamatory statement: "They are expressions of opinion, privileged under the First Amendment to the United States Constitution." *Id.*, at 247. The United States Supreme Court seven years later in Milkovich specifically found that a person's opinions are not privileged under the First Amendment to the United States

Constitution. Opinions of the Oklahoma Supreme Court on United States Constitution issues yield to later decisions by the United States Supreme Court. Defendants' citation of the Miskovsky decision to this Court on this issue is less than candid.

## V. THE CREDIBILITY OF A WITNESS IS ALWAYS AN ISSUE

In libel cases, knowledge of falsity speaks to what was in the Defendants' mind, but decisions as to what Defendants knew is within the exclusive right of the jury to determine, considering all evidence and judging testimony based on the demeanor and credibility of each witness. The jury as the trier of fact must determine if Defendants in this case published each of the 24 libels and 28 false light statements Tilton complains of, Joyce 2d Aff. Ex. 410, "with knowledge of falsity or reckless disregard as to the truth or falsity". Masson, 111 S.Ct. at 2435.

In support of their Motion for Summary Judgment, Defendants have submitted several affidavits which attempt to address Defendants' knowledge of the truth or falsity of the libels asserted in Plaintiff's Complaint. Since Defendants' knowledge of truth or falsity is central to the burden of proof, and ultimately, liability, it is critical that Defendants not be permitted to side-step an ultimate issue of fact with self-serving conclusory affidavits. Were this Court to hold that Defendants' affidavits are dispositive concerning Defendants' knowledge of truth or falsity, then no libel action could ever proceed beyond a motion for summary judgment since a defendant could merely assert that he or she believed the published libel to be the truth. The law cannot tolerate such an absurd result.

In Galindo v. Precision Am. Corp., 754 F.2d 1212, 1221 (5th Cir. 1985), the court noted:

> We have long recognized that mere statements of conclusions of law or ultimate fact cannot shift the

> summary judgment burden to the non-movant. *See e.g., Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978)(conclusory "bald assertions of ultimate facts are ordinarily insufficient to support summary judgment"); *Benton-Volvo-Metairie, Inc., v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-139 (5th Cir. 1973)(non-movant survives motion for summary judgment, without countering movant's showing, where movant's affidavit "set forth only ultimate facts or conclusions"); *Dawkins v. Green*, 412 F.2d 644, 646 (5th Cir. 1970) (same); *Bridges v. Internal Revenue Serv.*, 433 F.2d 299, 300 (5th Cir. 1969) (bare conclusory allegations that defendant was within scope of authority cannot sustain summary judgment); C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* 2d §2738 (1983).

In the present case, Defendants assert in their affidavits that they believed the truth of the libelous statements.[7] Clearly, whether or not Defendants actually believed the truth of those statements is an ultimate issue of fact and to make such a bare, conclusory allegation is not sufficient to support a motion for summary judgment. The Tenth Circuit held in Romero v. Union Pacific RR., 615 F.2d 1303, 1309 (10th Cir. 1980) that in a retaliatory discharge case, "the question of retaliation is particularly inappropriate for summary judgment disposition since the primary issue is one of intent and motive." Intent and motive is particularly within the mind of the Defendant.

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[7] Affidavits of Gordon, ¶ 117, Affidavit of Sutherland, ¶¶ 39 and 50, Affidavit of Kaplan, ¶ 15, Affidavit of Sawyer, ¶¶ 26 and 31.

An additional defect with respect to Defendants' affidavits centers on the credibility of the affiants:.

> A similar problem involving credibility arises when the knowledge of the events or occurrences on which the action is based lies exclusively within the control of the party moving for summary judgment. This situation occurs most commonly in actions in which the main issue involves the movant's state of mind, such as in fraud or defamation cases. Courts have been reluctant to deprive the non-moving party of the opportunity of testing the credibility of the movant or his witnesses in open court in this context. As explained by one commentator, "there is a justifiable judicial fear of the injustice which could result from judgment based on affidavits asserting facts that are, because of their nature, incapable being effectively controverted." Wright & Miller, §2726 at 121 (emphasis added)

As Wright & Miller correctly observe, the central issue in a defamation case is the state of mind of the defendant. In Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2nd Cir. 1967) *cert. denied*, 395 U.S. 906 (1969), the court held that in the context of a stockholder's derivative action

> [T]here will be issues as to the knowledge, intent and motive which will require a full trial with an opportunity to observe the demeanor of the witnesses, and to conduct cross examination in open court. In such cases summary judgment cannot be granted even after discovery has been had. (citations omitted)(emphasis added).

*See also* Poller v. CBS, 368 U.S. 464, 473 (1962)("we believe that summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot.")

The crux of Defendants' affidavits is to attempt to dispel any doubt as to Defendants' belief in the truth of the libelous statements (denial of knowledge of falsity) in order to avoid trial. However, affidavits are not a substitute for trial and summary judgment is not proper where an issue turns on credibility. Madison v. Deseret Livestock Co., 574 F.2d 1027, 1036 (10th Cir. 1978). And as the Tenth Circuit noted in a case involving an airplane crash, "[I]t is particularly wrong to base a summary judgment on a deposition of an interested party on facts, like much of the pilot's experience, known only to him - a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." National Aviation Underwriters, Inc., v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir. 1977) (emphasis added). In vacating the trial court's grant of summary judgment, the court in Altus Flying noted that "summary disposition prevented necessary examination of conflicting testimony and credibility in the crucible of a trial." Id. As the Supreme Court stated in Masson, 111 S.Ct. at 2434-35, "On summary judgment, we must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence." (Emphasis added)

The following evidence establishes that there are real issues concerning the credibility of the affiants which must be resolved by the jury :

A. Credibility of Roberta Gordon

Gordon's pattern of lying in a Church (Joyce 2d Aff. Ex. VT-J36, Ex. 400 at 48) to a Church (Joyce 2d Aff. Ex. 401) and telling other people to lie (Joyce 2d Aff. Ex. 310) will bring her credibility into question in the jury's mind. The jury will have little difficulty finding that this person would lie under oath with or without additional compensation.

In ¶¶ 30, 31, and 115 of her affidavit, the Defendant Gordon asserts that the broadcast did not say that the water provided by Tilton came from Taiwan.[8] Her testimony as to what the broadcast "said" lacks credibility as it is a bald assertion, conclusory in nature and totally contrary to the message conveyed. Viewing the broadcast itself and observing the witness' demeanor will bear on the witness' credibility. (Joyce Aff. Ex. VT-1, Ex. VT-2.) Furthermore, her testimony relating to her employment contract that she received no bonus, considering the amount of her new compensation, its retroactivity, and grant of retroactive seniority bring her credibility into question. (Joyce 2d Aff. Ex. 122 at 588-648) Gordon's sworn testimony concerning the alteration of the videotape of the "former Tilton friend" contained in her affidavit at ¶ 75, in considering the true text and the manner in which it was edited from the use of the word "I" to the use of the word "we", is simply not credible.

The evidence presented by Plaintiff in opposition to the Motion for Summary Judgment contain many facts which controvert Gordon's conclusory statement in her affidavit in ¶ 117:

> "Before the PrimeTime Live broadcasts of November 21, 1991 and July 9, 1992, I believed that all the statements reported in them were entirely accurate."

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[8] See more detailed discussion of this statement at page _____ of this brief.

Her demeanor and her credibility when confronted with the facts before the jury is real evidence that will persuade the trier of fact to reject her testimony.

B. Credibility of Diane Sawyer

In her affidavit at ¶ 31, Defendant Sawyer said: "I had no reason to doubt the truth of the statements about Reverend Tilton that were included in the July 9, 1992 broadcast and I deeply believe them to be true when broadcast." In reality, she had been provided copies of the Morales trial transcript and exhibits (Joyce Aff. Ex. 29) showing: (1) the Holy Water was not purchased from Taiwan; (2) Tilton's Church did support the World Harvest Orphanage; and (3) there were never "thousands" of prayer requests found in the trash "at the bank and the marketing research center." Sawyer also had the uncut video of trash which did not show thousand of prayer requests. (Joyce 2d Aff. Ex. VT-J66). She may now say that she had no reason to doubt the truth of the statement - but she had reason. In addition to evidence controverting her affidavit, her testimony about this important subject lacks credibility.

Additionally, Sawyer's affidavit is an attempt to portray herself as a journalist simply relaying information gathered together by others to the viewers. Important to the trier of fact, in analyzing her demeanor and credibility, is her true motivation. Sawyer said, referring to a time before the first broadcast took on its final form, "When I saw Tilton on TV and what he was doing, I was appalled. . . . He needs to be stopped." (Joyce Aff. Ex. 76). The broadcast became a personal vendetta for Defendant Sawyer, severely impacting her credibility as a witness. Sawyer states in the broadcasts about Moore, "We asked him to show us how to start a big money ministry like Tilton's." (Joyce Aff. Ex. 1, Ex. VT-1, Ex. 2, Ex. VT-2). This statement is false. At no time on the broadcast or the uncut ABC videotape does she say that; The entire interview was based on a lie. Ole Anthony testified at the Morales trial that they

did not go to Response Media for the purpose of inquiring about the Robert Tilton ministry: "That was an editorial that she (Sawyer) added on her own." (Joyce 2d. Aff. Ex. 29 at 448-449). Sawyer stated in her affidavit, ¶ 16, that "Mr. Anthony impressed me as sincere" and in her deposition testimony (Joyce 2d Aff. Ex. 155 at 591) that she believed Anthony to be a credible person. On hearing the testimony and seeing the video deposition of Anthony, the jury will find this is a lie.

C. Credibility of Jagnath Sharma

Sharma states in his affidavit at ¶ 4 that with respect to the India Crusade he personally observed Jack Harris, whom he understood to be a personal representative of Tilton, ask the crowd to donate money and that during the collection he saw Robert Tilton present on the stage. That testimony is refuted by ABC's uncut video of the crusade (Joyce 2d Aff. Ex. VT-J40, Ex. VT-J41 and Ex. VT-J42) and five of Plaintiff's witnesses. Plaintiff's testimony is corroborated by the Defendants' own executive producer, Richard Kaplan. Brief summaries of the witnesses' testimony are as follows:

Dan Moroso was present at the 1992 India Crusade and testified that he was not aware that an offering was going to be taken up and that the offering taken up was independent of Robert Tilton or Word of Faith organization. (Joyce 2d. Aff. Ex. 149 at 171, 177-178). In his May 25, 1993, affidavit which was introduced into evidence at the Preliminary Hearing, Pastor Dayanandhan, the assistant crusade coordinator and the person who served as Pastor Tilton's translator while he preached, states "I personally was responsible for taking up the offerings at the crusade in Madras. Robert Tilton was never present when the crusade offerings were taken up. The crusade offerings were taken up for the benefit of the local Pastors in India." (Joyce Aff. Ex. 60). Dewey Cosgrove also testified that Pastor Tilton was not present when the offering was received and that it was taken up for the native pastors. (Joyce Aff.

Ex. 61 at 27-28). Jack Harris, the India crusade coordinator, testified Tilton was not present when the offering was received and the total amount of the offering was approximately $2,000, the largest amount ever collected. (Joyce Aff. Ex. 62 at 64-65). Pastor Tilton testified that there was not an offering taken up on behalf of himself or Word of Faith. (Tilton Aff. ¶ 12) (Joyce Aff. Ex. 56 at 27-28). The Church's financial records show no money was made on this crusade which also demonstrates the falsity of this segment of the broadcast. (Joyce Aff. Ex. 63).

Richard Kaplan testified that Defendants have no evidence that any money collected by the minister at the India crusade went to Tilton. (Joyce Aff. Ex. 8 at 242-243). Uncut ABC Videotape shows Tilton not on stage when offerings were taken up and that Defendant forged a tape to show that he was. (Joyce 2d Aff. Ex. VT-J40, Ex. VT-J41, Ex. VT-J42).

D. Credibility of Richard Kaplan

The thrust of Richard Kaplan's affidavit appears at ¶¶ 13, 14, and 15, which are no more than self-serving conclusory remarks expressing Mr. Kaplan's hope that at least for purposes of this litigation, the editing techniques used prior to the broadcast in question did not deceive or mislead the public or viewers in any way. However, in Kaplan's deposition, his testimony acknowledges deception in that he assumed that the use of the word "We" by Tilton's former friend refers to Tilton and that such an edit would change the meaning of the sentence. (Joyce 2d. Aff. Ex 131 at 264-266). Furthermore, a fair reading of ¶ 14 of his affidavit relating to the crusade in India supports Plaintiff's view of the facts but simply concludes that he, Kaplan, did not believe the edit deceived or mislead the public or viewers in any way.

E. Credibility of Kelly Sutherland

Sutherland refers to "Source 2" (Wally and Betty Turnbull) in her August 2, 1993, affidavit and states that they provided information about Tilton on the condition that their identity be kept confidential. (Joyce 2d Aff. Ex. 421) Wally Turnbull testifies he just didn't want to be identified or associated with the story (but never specifically asked to have his name be kept confidential). (Joyce 2d Aff. Ex. 173 at 74-75) Betty Turnbull testifies that she never personally told Sutherland not to use her name on a broadcast. (Joyce 2d Aff. Ex. 172 at 41) Sutherland testifies "Mr. Turnbull asked me to keep his name and his efforts confidential." (Joyce 2d Aff. Ex. 162 at 43)

Sutherland's August 12, 1993 affidavit states that "Source 2's request for confidentiality stemmed from Source 2's fear of reprisals against Source 2, Source 2's family and Source 2's business." Sutherland testifies at her deposition that the "source" expressed fear of reprisals against his family and his business. (Joyce 2d Aff. Ex. 162 at 44) In Betty Turnbull's deposition, she says that she did not tell Sutherland that she feared reprisals against her if her name was used. (Joyce 2d Aff. Ex. 172 at 41) Wally Turnbull testifies "We didn't spell out any criteria for my involvement," that he simply didn't want to be associated with the story and that he "was not concerned really of the news media or concerned of Robert Tilton." (Joyce 2d Aff. Ex. 173 at 74, 78)

Sutherland and Gordon both state in their affidavits that they did not know of the name "World Harvest Orphanage" until after they had already been to Haiti and Gordon went to a Church service (on September 15, 1991). Sutherland also implies that she learned of the Sullivans on October 23, 1991. Wally Turnbull testified that in the first phone call with Sutherland, she asked him about World Harvest Orphanage and Lee Sullivan. (Joyce 2d Aff. Ex. 160 at 8) Betty Turnbull verified this. (Joyce 2d Aff. Ex. 172 at 7-8, 51) Mrs.

Turnbull also testifies that she thinks the first phone call occurred in late '90 early '91 (Id. at 17).

Sutherland's affidavit, ¶¶ 12-30, reads chronologically and she mentions telephone calls to the Turnbulls in ¶¶ 14-15, which immediately precedes her first trip to Haiti. Also, on her first trip to Haiti, Sutherland looked up the "World Harvest for Christ" orphanage which she had discovered during her research (Sutherland Aff. ¶ 19). Out of the hundreds of orphanages that exist in Haiti, Sutherland picked one with such a similar name to World Harvest Orphanage without having already heard of the name. ABC document bearing bate stamp number A20056 certainly makes it appear that Sutherland made contact with Turnbull prior to her first trip wherein it states "gone Sept 2nd - Haiti after 5th Sept". (Joyce 2d Aff. Ex. 250)

As with the other affidavits, Sutherland believed the broadcasts to be "entirely accurate", and as said before, such a statement is merely self-serving and conclusory. It is the jury's job to make or reject that contention.

It would be error for this Court to consider any portions of Defendants' affidavits, which attempt to resolve the ultimate issue of fact concerning Defendants' knowledge of truth or falsity of the broadcasts. The authorities cited above are in accord that courts should not deny a non-moving party's right to test the credibility of a witness with regard to facts within the exclusive knowledge of the witness. Intent and motive are elements of a witness's testimony which impact his or her demeanor and credibility and provide real evidence at trial. These factors, together with the evidence presented herein, demonstrate the existence of such significant differences between the subject affidavits, deposition testimony and exhibits that only the trier of fact should properly pass on the credibility of the witnesses. On that basis alone, Defendants' Motion for Summary Judgment should be denied.

## VI. INDIA - DEFENDANTS' BOGUS POSITION

Defendants' brief, regarding the libel asserted as to the India Crusade is so blatantly bogus that it must be addressed. Defendants' brief states at 55:

> As Diane Sawyer reported: "[T]ilton tells his viewers that their donations enable him to win souls around the world . . . Tilton tells his followers they finance crusades in countries too poor to pay themselves." ABC's report of Tilton's India crusade revealed that at the crusade money was collected from the attendees nightly.

It is obvious why Defendants do not accurately quote and eliminate part of the quote from their broadcast. The set up and entire complained of libelous statement is:

> SAWYER: [voice-over] And something else about Tilton the missionary. Repeatedly, he tells his viewers that their donations enable him to win souls around the world.
>
> TILTON: [television broadcast] - Word of Faith Ministries, you, the Family Church, underwrites totally this particular evangelism unit.
>
> SAWYER: [voice-over] Tilton tells followers they finance crusades in countries too poor to pay themselves.
>
> INDIAN TRANSLATOR: [Speaking Hindi]
>
> EMCEE: He's come all the way from America!
>
> INDIAN TRANSLATOR: [Speaking Hindi]
>
> SAWYER: [voice-over] So PrimeTime decided to follow Robert Tilton to India this past March.
>
> TILTON: Do you want to please God tonight?

INDIAN TRANSLATOR: [Speaking Hindi]

SAWYER: [voice-over] Well, there was Tilton, passing the collection plates nightly. If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars --

TILTON: . . . Hallelujah! (Joyce Aff. Ex. 2 at 27)

This segment was created by Defendants to tell the viewing audience that Tilton was a liar, that he tells his people they financed the crusade, but he was over there getting rich off the backs of poor people. ". . .there was Tilton, passing the collection plates nightly." The knowledge of falsity of this statement is conclusively established by ABC's own uncut, unedited footage.

While Diane Sawyer was stating: "Well, there was Tilton, passing the collection plates nightly.," what the audience was seeing was a woman passing a collection plate, but the viewers could still hear Tilton preaching while the woman was shown passing the collection plate, and then the viewers saw Tilton preaching. Examination of ABC's uncut, unedited tape shows that never happened. Defendants cut the video of another person who was preaching when the woman was passing the collection plate, and preaching after the woman was passing the collection plate from their video footage and substituted the video of Pastor Tilton preaching before and after the woman taking the offering and substituted Pastor Tilton's voice during the woman taking the offering. This is shown in the raw footage. (Joyce Aff. Ex. VT-J22)

ABC's brief continues at page 55 stating:

"As set forth in the affidavit of Robbie Gordon ABC had every reason to believe in the accuracy of Mr. Sharma's report, "Tilton can offer no evidence that ABC knew that any information provided by Sharma was false or ABC had any doubts."

Plaintiff can offer some evidence, they can show Defendants' uncut footage, which does not support that Tilton was on the stage and does not support that Tilton was present when the collection plate was passed and can offer Defendants' uncut footage to show that they edited footage to show Tilton preaching and taking up the offering just as Diane Sawyer said. This must come under the big lie theory, if you tell a big enough lie the Court might believe it, stating that we can offer no evidence that they knew this information was false is laughable.

There can be no question that Plaintiff will prove actual malice with respect to the India Crusade. The jury will find, as it must find, it can find nothing else, that Defendants lied to the American public when they said, "Well, there was Tilton passing the collection plate every night" and their own uncut video footage proves their knowledge of falsity.

The balance of the Brief to page 57 does not merit response and the specific items that are addressed are covered by plaintiff's statements of controverted facts with their accompanying exhibits, all of which are material to the libels alleged by Plaintiff. The Court, upon reading the Defendants' brief will be impressed with the fact that most of that brief is directed toward statements contained in portions of the broadcast which were not libelous and which were not asserted to be libelous by Plaintiff. And their brief, as their affidavits in support, is not relevant to either the Motion for Summary Judgment or the Trial of this matter.

VII. DEFENDANTS' INSUPPORTABLE REASSERTION OF PREVIOUSLY DENIED LIBEL PROOF PLAINTIFF DOCTRINE

On page 57 and 58, Defendants assert that summary judgment should be granted because Pastor Tilton is libel proof. Note the following quoted from Defendants' brief:

As the Second Circuit has explained:

> "[The] doctrine thus measures the incremental harm inflicted by the challenged statement beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as nonactionable. Herbert v. Lando, 781 F.2d 298, 311 (2d Cir., 1986), *cert. denied*, 476 U.S. 1182 (1986)

Note the use of the word "explained" and the bracketed "The". What goes in the bracketed "The" portion to make the quote truthful is as is found on the cited page 311: "This branch of the libel proof." The use of the word "explained" is more egregious considering the holding in Herbert v. Lando, 781 F.2d at 312:

> We, therefore, need not decide whether a Court can grant summary judgment on separate unrelated statements which may have been made with actual malice pursuant to the incremental harm branch of the libel proof document.

Defendants' quote from Lando preceded by the word "explained" and not informing the Court that the Lando decision did not support that which they urged, is, charitably speaking, being less than candid with the Court. Defendants are also less than candid with the Court in that they fail to point out that this identical issue was raised by them in this case in their motion for judgment on the pleadings, was fully briefed and presented, and that Judge Brett overruled that motion. A copy of Judge Brett's Order is attached (Joyce 2d Aff. Ex. 408). Plaintiff's winning brief is found at Docket No. 29.

This is a simple libel lawsuit. The action only concerns the 24 libels containing 40 libelous statements and the 28 false light statements and the gist of those libels as set forth on Ex. 410 of

Joyce 2d Aff. There is no complex law involved. Plaintiff must prove all of the libelous statements are false by a preponderance of the evidence and Plaintiff must prove that Defendants published the 24 libels containing 40 libelous statements and the 28 false light statements with knowledge of falsity or reckless disregard as to truth or falsity and harm to Plaintiff.

The libelous statements complained of are not instances where Defendants reported news. The libelous statements are lies created by Defendants in the creation of news. Knowledge of falsity is not difficult to prove when you can establish that the statement is a lie and that Defendants was the author of the lie. It is axiomatic that if you create a lie, you know it is false. It is difficult, if not impossible, to tell what lawsuits Defendants think they are going to defend from their brief as the irrelevant information they have presented before the Court. As stated, Plaintiff Robert Tilton's lawsuit is simple and the required proof should be neither voluminous or time consuming. Plaintiff's lawsuit does not have anything to do with whether or not the Word of Faith World Outreach Center Church sends a thank you note to persons that gives the Church $2.00 and does not send a thank you note to a person that gives the Church $1.99. That kind of clap trap has nothing to do with any of the 24 libels or 28 false lights that are alleged in Tilton's complaint, anymore than whether or not Boston Avenue Methodist Church thanks someone who sends in a $1.99. Equally irrelevant is the size Tilton's shoe, the kind of toothpaste he uses or what kind of car he drives. None of those matters are defensive to any the libel or false light statements of which plaintiff complains. (Joyce 2d Aff. Ex. 410) In other words, if it does not have anything to do with the Tilton's complaints as set forth in Ex. 410 of Joyce 2d Aff., it does not have any business in this lawsuit. Plaintiff's motions in limine should result in Defendants being forced to defend

the action pending against them, and prohibit them from trying the religious or operational practice of the nonparty Church.

## VIII. KNOWLEDGE OF FALSITY: PRAYER REQUESTS IN THE TRASH

Since destruction of evidence by Defendants is one of the items of proof with reference to the prayer requests in the trash libel, a more detailed explanation of the exhibits attached is required. The jury in this case will find that Defendants stole prayer requests from the Bank, from Internal Data Management and white mail prayer requests from the Church Sanctuary in Dallas, Texas. The jury will find that Defendants filmed Anthony removing trash containing prayer requests from the dumpster behind the main bank downtown and took video and still pictures showing prayer requests, with names on those prayer requests, at that location. The jury will find that the defendants have destroyed both the video and still pictures of that filming. The jury will further find that the defendants took video and still pictures at IDM. The jury will find that the persons present during that video taping and still picture taking were Anthony, Roberta Gordon and Cooke. The jury will find that those persons planted the 37 prayer requests in the trash in order to frame Pastor Tilton of the crime of mail fraud. The jury will find that the affidavits and deposition testimony of Gordon, Cooke and Anthony to the contrary are false. Some of the evidence that is available to the jury upon which the jury will make these findings is as follows:

Anthony had a still camera which was used to take pictures of trash at dump. (Joyce 2d Aff. Ex. 407) Anthony testified: it was ABC's idea for them to go through the trash and that he was under the constant direction and supervision of ABC when going through the trash, that Gordon and Cooke were present during some of the trash runs, that the Tilton Evidence Log was accurate and that it showed the date and place where each of the prayer request was found. (Joyce 2d Aff. Ex. 189 at 122, 118, Ex. 190 at 217, Ex. 199

at 62-62) The *PrimeTime* broadcasts showed the dumpster downtown as the location where the prayer requests were found. John Baker testified that none of the Church's prayer requests or mail was sent to the downtown location during 1991, therefore it was impossible for any prayer request to be found in that location. (Joyce 2d Aff. Ex. 105) Harry Guetzlaff testified as to the accuracy of the evidence log and also testified that on one night he let Anthony off to meet with ABC personnel and picked him up the next morning. (Joyce 2d Aff. Ex. 125 at 15-16, Ex. 194 at 33) The jury will find that was the night of the filming. The jury will find that Guetzlaff and Holloway did not know of the frame and that this information was kept confidential between Anthony, Gordon and Cooke.

The jury will find that Defendant Capital Cities purchased the false testimony of Cooke, who was a free lance photographer at the time of the filming, but who was given a contract that pays him $105,000.00 a year from ABC whether he does any work or not, as he reluctantly testified in his deposition. (Joyce 2d Aff. Ex. 164) The jury will find that Defendants paid for the false testimony of Gordon, who was a free lance producer at the time of the broadcast who was rewarded for her lies in creating the broadcast and further rewarded for her perjury in her affidavit and at trial by giving her a high paying job which contained numerous bonuses. It must be noted that she first testified she received no bonuses, but after questioning, she admitted to items which were clearly bonuses, they included a stock option in Capital Cities, retro-active seniority back to 1989 for a contract entered into in 1992 and retroactive compensation under a contract entered into in May back to January and compensation in the amount of $199,949 per year. (Joyce 2d Aff. Ex. 122).

Further evidence that they framed Pastor Tilton follows. John Baker testified that no prayer requests were ever thrown away at the bank. Larry Shaffer testified that no prayer requests were

thrown away by the bank and that the only way that certain prayer requests could have been in the trash at the bank was for an employee of the bank to have stolen them and planted them in the trash. (Joyce 2d Aff. Ex. 105, Ex. 156) Mark Buntz testified as an expert that there was no way they could be in the trash at the bank. (Joyce 2d Aff. Ex. 102, Ex. 104) Lynne Bland testified that the bank employees did not throw away mail in the trash. (Joyce 2d Aff. Ex. 107) The Church's contract with the Bank shows they were paid on a per piece basis and the compensation payment dictated that work be done as fast as possible - they were not hired to read the mail. The letter to Diane Sawyer from a former cleaning person stating that there was never any prayer requests in the trash. (Joyce 2d Aff. Ex. 52) The original envelope of the mailing which prove that some of the items were stolen as early as June and July of 1991 and then were placed back in the bank absent the content which was in the possession of the defendants in September. Partner records which reflect the gift amount shown on the envelope to be the amount shown on the envelopes and in amounts not compatible with the partner's prior gifts. The original prayer requests that are in the possession of Defendants. (Joyce 2d Aff. Ex. 423) The original envelope is in the possession of IDM an "LU" on the original envelope prove the original prayer request never made it to IDM. Defendants or their agents stole the money from the envelopes, put a token amount back in the envelope and stole the prayer requests and the jury will so find. Mike Conners testified that no items were thrown in the trash at IDM, that he checked the day after the broadcast and found there were none there. (Joyce 2d Aff. Ex. 109, Ex. 110) John Longley testified that there could not have been any prayer requests in the trash at IDM during the 1991 year because of the elaborate check and recheck procedures to make sure no prayer request was ever thrown away. (Joyce 2d Aff. Ex. 139, Ex. 394) Bruce Grabow testified as to his procedure of going through the

trash, making certain that no prayer request was ever thrown in the trash. (Joyce 2d Aff. Ex. 123) The fact that Defendants have produced no video or still pictures showing Anthony getting the prayer request from the trash -a major segment in the broadcasts. Everything else that touched and concerned Pastor Tilton was videoed, why are there now no videos on the most important segment?

The white mail that Defendants have in their possession was stolen from the Church sanctuary by persons employed by ABC, placed on the payroll of the Church for that specific purpose. Mike Conners, John Longley, IDM employees testified that all the white mail was sent to Texas. (Joyce 2d Aff. Ex. 109, Ex. 110, Ex. 139, Ex. 394) Marte Tilton testified that it was placed in the Church Sanctuary for prayer by the intercessory prayer group. (Joyce 2d Aff. Ex. 166) That white mail is now in the possession of Defendants. The jury will find that Anthony forged the prayer request which was the subject of his testimony before Federal Court in Dallas shown on the transcript. (Joyce 2d Aff. Ex. 29) Gordon had in her possession the Federal Statutes concerning mail fraud, the jury will find she had those in her possession in order that she could study those statutes and know exactly what she needed to do to frame Pastor Tilton of mail fraud.

## IX. CONCLUSION

Defendants Motion for Summary Judgment should be summarily denied without the necessity of oral argument. The motion and affidavits submitted in support are spurious.

The exhibits attached to this brief and Plaintiff's Brief in Support of his Motion for Partial Summary Judgment are more than sufficient to establish that Defendants have not shown their entitlement to summary judgment in this case beyond a reasonable doubt. The exhibits attached to Plaintiff's briefs are more than sufficient for this

Court to find that the jury in this case could find that the complained of statements are false, and that clear and convincing evidence establishes that the Defendants had knowledge of the falsity of those statements or published them with reckless disregard as to their truth or falsity.

/s/ J.C. Joyce

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of April, 1995, two true and correct copies of the above and foregoing documents were delivered to Mr. Muchmore's office in Tulsa, Oklahoma.

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/s/ J.C. Joyce

J. C. Joyce

**IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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CASE NO. 95-5152

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ROBERT G. TILTON
Appellant,

vs.

CAPITAL CITIES/ABC, INC., ET AL.
Appellees.

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On Appeal From the United States District Court
For the Northern District of Oklahoma

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# BRIEF OF APPELLANT

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

District Court Subject Matter Jurisdiction. United States District Court for the Northern District of Oklahoma ("Dist. Ct.") has diversity jurisdiction under 28 U.S.C. § 1332 over the claims asserted by Plaintiff against Defendants. Plaintiff is a citizen of Texas, individual Defendants are citizens of states other than Texas, corporate Defendants are incorporated and have their principal places of business in states other than Texas. Matter in controversy exceeds Fifty Thousand Dollars ($50,000) exclusive of interest and costs. (Aplt.App.V1 at 53, 35)

Appellate Jurisdiction. On May 24, 1995, Dist. Ct. entered an Order granting summary judgment in favor of Defendants Capital Cities/ABC, Inc. ("Capital Cities"). (Aplt.App.V3 at 825-30) On May 26, 1995, Dist. Ct. entered an Order granting summary judgment in favor of the remaining Defendants. (Aplt.App.V3 at 831) Judgment and Order were filed June 19, 1995 and entered June 20, 1995. (Aplt.App.V3 at 832-905) On July 19, 1995, Plaintiff timely filed his notice of appeal, pursuant to FRAP 4(a)(1), from this final judgment disposing of all parties and issues. (Aplt.App.V3 at 908-09) The Tenth Circuit has appellate jurisdiction. 28 U.S. C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Dist. Ct. erred in granting summary judgment to Defendants Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., Diane Sawyer, Robbie Gordon and Kelly Sutherland.

Whether Dist. Ct. may ignore what Plaintiff asserts Defendants implied and viewers understood and consider only the literal meaning of the words as urged by Defendants and disregard the context (juxtaposition of the audio and video portions of a TV

news program) in determining defamatory meaning, falsity and actual malice.

Whether Dist. Ct. may resolve factual disputes contained in the record in favor of movant in granting a motion for summary judgment in a defamation action.

Whether Plaintiff may prove a previously published statement is false and enjoin the republication of that same proven statement, even if the first publication was not made with actual malice.

Whether Dist. Ct. erred in striking Plaintiff's expert witness' affidavit, not considering that affidavit on summary judgment and refusing to allow the expert's testimony at trial.

Whether Oklahoma's statutory newsman's privilege is applicable to a libel case governed by New York Times when the newsman asserting the privilege is a named defendant.

## STATEMENT OF THE CASE

I. **Course of proceedings.** Public figure plaintiff sued for libel, false light invasion of privacy and injunctive relief against media defendants arising out of the November 21, 1991 broadcast of a TV program and its July 9, 1992 rebroadcast with minor changes and additional material. (Aplt.App.V1 at 52, 55)[1] Plaintiff filed his Final Amended Complaint on July 8, 1994 (by permission replacing it on July 26, 1994). (Aplt.App.V8 at 2224) Defendants filed their Answer July 15, 1994. (Id.) Defendants filed a summary judgment motion on behalf of Capital Cities asserting "no proof ... Capital Cities ... had anything whatsoever to do with the broadcasts at issue." (Aplt.App.V1 at 263) Dist. Ct. sustained that motion finding Capital Cities is not liable for the alleged tortious acts of the

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[1]Aplt.S.Add. indicates separate addendum of documents filed under seal. Aplt.T.Add. indicates separate addendum of videotapes with some counter numbers (10:00:00).

remaining Defendants under a respondeat superior theory and Plaintiff's evidence was insufficient to establish actual malice as to Capital Cities. (Aplt.App.V3 at 827, 829) Defendants filed a summary judgment motion on behalf of all Defendants asserting all of Plaintiff's libel and false light claims be dismissed because the challenged statements were true or made without actual malice and urging injunctive relief was not available which Dist. Ct. sustained and incorporated in the final judgment. (Aplt.S.Add. at S27, S65; Aplt.App.V1 at 269070; V3 at 831, 837) Dist. Ct. sustained Defendants' motion to strike and refused to consider the affidavit of Plaintiff's expert linguist, Dr. Lashner, which was submitted in opposition to Defendants' motion for summary judgment. (Aplt.App.V3 at 832-836; V2 at 394-406) Also at issue are the Dist. Ct.'s Orders denying Plaintiff's motion to compel Defendants to identify their confidential sources and granting Defendants' motion in limine concerning the newsman's privilege. (Aplt.App. V1 at 256-60; V3 at 816-24, 906-07)

II. Statement of facts. Plaintiff, Robert G. Tilton, on November 21, 1991, was principal pastor of a church in Farmers Branch, Texas ("Church"), with a local congregation of over 8,000 members, and head of the "fastest growing ministry" on TV. (Aplt.App.V1 at 59, 62) Tilton's Church conducted an extensive evangelistic TV ministry broadcasting the Church's Sunday services live and a daily program, Success·N·Life, and sending regular mailings[2] to "partners" who asked to be placed on the Church's

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[2] Mailings printed by Response Media. (Aplt.App.V4 at 1093) Post Office delivered mail to Commercial Bank in Tulsa (the "Bank"). Donations were removed and deposited to the Church's account. Internal Data Management ("IDM") daily picked up all the rest of the mail, performed computer processing and forwarded the prayer requests to Tilton. (Aplt.App.V4 at 1185-86) IDM also forwarded all "white mail" to the Church. White mail is mail not in response to a Church mailing, contained in an envelope (usually white), not a Church envelope. White mail is usually from a person writing the Church for the first time. Original white mail was

mailing list. (Aplt.App.V1 at 60, V4 at 1044-45) Tilton's Church also supported missions including Rev. Lee and Chris Sullivan's World Harvest Orphanage in Haiti and Hugo Morales' schools and mobile medical clinic in Guatemala, and crusades, including one in India in 1992. (Aplt.App.V2 at 378-379; Aplt.T.Add. T14)

On November 21, 1991, Tilton's life radically changed - ABC News PrimeTime Live ("PrimeTime") presented an hour-long news program, "Men of God" ("PT I"), which featured Tilton. (Aplt.App.V1 at 55; V4 at 1114-43) That news program, as revised, was rebroadcast on July 9, 1992 ("PT II"). (Aplt.App.V1 at 55; V4 at 1144-73)

Defendant Capital Cities through its wholly owned subsidiary, Defendant American Broadcasting Companies, Inc. ("ABC"), broadcasts PrimeTime over the ABC network. Defendants Diane Sawyer, Robbie Gordon (independent contractor) and Kelly Sutherland were the anchor/correspondent, producer and associate producer, respectively, for both broadcasts and Richard Kaplan was the executive producer. (Aplt.App.V1 at 37; V2 at 311) In preparing these broadcasts, Defendants also used the services of Ole Anthony, Harry Guetzlaff, Powell Holloway and other members of the Trinity Foundation, Inc.,[3] freelance cameraman Jeff Cooke and others. (Aplt.App.V2 at 329-330, 332-333, 340; V5 at 1305)

**III. Facts common to all libels.**

1. It was Sawyer's idea to do the PrimeTime show on Tilton. (Aplt.App.V8 at 2091)

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placed in the Church sanctuary for prayer by the Church's intercessory prayer group. (Aplt.App.V4 at 1061-62) Defendants pictured white mail during the "prayer requests in the garbage" segment as Sawyer says "We found heart-breaking appeals ..." (Aplt.T.Add. T1, T2)

[3] "Trinity" from the atomic testing site, Trinity Flats in Utah, not the Holy Trinity.

2. Sawyer became interested in Tilton while viewing him on TV during her travelling. (Aplt.App.V8 at 2173, 2176)

3. Sawyer told Connie Cohn: "When I saw Tilton on TV and what he was doing, I was appalled ... He needs to be stopped." (Aplt.App.V5 at 1225)

4. Sutherland's handwritten note, "no fraud to be had on this guy = can have fun w/ him though" related to Tilton. (Aplt.App.V5 at 1227-1228; V8 at 2185)

5. Defendants videotaped about three minutes of cemetery footage with the camera zooming in and out to show "ROBERT" on a tombstone (no fraud - have fun with him - destroy him - seal him in a coffin). (Aplt.T.Add. T4)

6. On August 25 and September 15, 1991, Gordon, Cooke and other ABC agents, representing themselves as Church worshippers, attended and filmed with hidden cameras the Church services and their conversations with each other and with Church worshippers. (Aplt.T.Add. T5-T11) After the service, Gordon lied to Pastor Tilton and asked him to pray for her in the Church sanctuary; Cooke later asked her concerning that prayer: "Did you have an orgasm?" (Aplt.App.V5 at 1230-1233; Aplt.T.Add. T11)

7. Gordon's August 27, 1991 memo to Sawyer and Rosen, contains Gordon's plan for the broadcast as it was essentially carried out:

> I recommend we structure the story in two parts separated by commercial ... -- we would tease Tilton at the top of the first piece and use portions of him in the first piece, but then treat him as a stand-alone ... I think he'll play stronger that way -- first you need to get angry at the fraud these guys get away with and understand the loopholes in our laws which allow them to get away with this fraud. Both Grant

> and Lea are more obvious in their fraud (and more sloppy); but Tilton's picture is a whole profile -- an analysis of the making of a machine rather than isolated scams. (Aplt.App.V5 at 1234)

8. ABC intended to place its agents on the Church's payroll. (Aplt.App.V5 at 1243-1257, V8 at 2186-2187) Gordon's July 23, 1991 memo reports: "We have tried several ways to research this guy from the 'outside' ... I strongly believe that the only way we're going to ever find out things is from the inside." (Aplt.App.V5 at 1259) Later, "We have applications into the ministry for various jobs and if any of them come through we will need to spend a few days 'on the job' to get more undercover." (Aplt.App.V5 at 1242) Under false pretenses, Cooke, accompanied by Gordon, applied for a job at the Church and, at ABC's direction, gave and arranged for fraudulent information in his interview. (Aplt.App.V5 at 1260, V8 at 2075-2078; Aplt.T.Add. T12-13)

9. ABC had at least two agents on the Church's payroll or posing as members: (a) "Lee" - Gordon leaving Church says, "there goes Lee with the garbage, we should see," Cooke responds, "Do you think that is just the bathrooms and stuff?" and Gordon replies, "Probably."[4] (Aplt.App.V5 at 1252-1254, 1297; Aplt.T.Add. T9 at 08:50), (b) "Cheryl" - During a Church service, Gordon and Cooke make several references to an apparent Church member in a manner indicating they were working in conjunction with her (Aplt.T.Add. T8 at 51:55 - 59:08) and (c) Jane Doe - this may or may not be "Cheryl." (Aplt.T.Add. T8 at 54:45, 58:07, 58:39, 1:02:07) One or more of these agents stole the white mail

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[4] Gordon testified she didn't try to get people hired in the Church's custodial department, but doesn't know if ABC did. (Aplt.App.V8 at 2092) Cooke testified he didn't ever learn the name of a custodial employee of the Church. (Aplt.App.V8 at 2078)

shown in the broadcast from the Church sanctuary. (Aplt.T.Add. T1-T2) Defendants had the motive and opportunity to steal the white mail, and Defendants have the original white mail in their possession. (Aplt.T.Add. T9 at 08:50; Aplt.App.V5 at 1284)

10. ABC had operatives on IDM's payroll who stole documents. A document Defendants claim they found in the garbage was an IDM report. (Aplt.App.V4 at 1092) IDM's president, Mike Conners, testified that report went to the Church, a backup copy was kept at IDM, they were never thrown away and the original report in Defendants' possession is the only one missing from IDM's records - "somebody stole it from our organization." (Id.)

11. Sutherland as "Margaret Sutherland" and Gordon as "Lois Von Koester" had their names fraudulently placed on the Church's mailing list to get the Church's mailings. (Aplt.App.V1 at 290; V5 at 1298-1304; V8 at 2098-2099)

12. ABC had an employee volunteer under false pretenses with members of Trinity Foundation at the Church's phone ministry. (Aplt.App.V5 at 1305; Aplt.T.Add. T14-T15) Their hidden camera film shows they stole prayer requests (Church property): "Guess what I got." "Guess what I got, too." "Unfortunately, I had to fold them because I just wanted, you know ... they're not gonna photograph that well, but --" and "They can iron them ... ." (Aplt.T.Add. T14 at 40:10)

13. Gordon, producer, and Cooke, photographer, were both independent contractors when PT I and PT II were created and were both present at trash sweeps which were directed by ABC. (Aplt.App.V5 at 1306-1333; V8 at 2027, 2068, 2094, 2100) After Defendants found out the wrong bank was shown on PT I as the place where they found prayer requests, Gordon commingled the evidence. See p. 24, infra. After this suit was filed, Gordon became Defendants' employee, receiving retroactive seniority, Capital Cities'

stock options and a multi-year contract. (Aplt.App.V8 at 2101-2107) Cooke, the freelance photographer, received a contract renewable yearly at his option whereby he receives from ABC $700 a day for 150 days per year, whether he works or not, as a standby fee for the use of his own camera equipment. If he does any work for ABC, he receives his normal hourly rate, in addition to the $105,000 per year. (Aplt.App.V8 at 2073-2073A) Immediately preceding the broadcast, Defendants sent letters to newspaper and TV critics enclosing the Rough Final Script and the pre-broadcast PT I videotape, followed by a November 19th press release. (Aplt.App.V5 at 1334-1377)

14. Sawyer, Gordon and Kaplan knew the broadcasts could harm Tilton. (Aplt.App.V8 at 2093, 2133, 2174)

15. Reactions to the broadcast in newspaper articles, TV newsclips and viewers' letters prove the viewing audience understood the libelous implications asserted by Tilton. (Aplt.App.V5 at 1378-1405; V6 at 1406-1696; Aplt.T.Add. T16-T17)

16. On November 22nd, the morning after PT I, a federal grand jury subpoena was issued and served on the Bank's CEO, John Baker, to produce the Bank's records for Tilton and his Church to the FBI. (Aplt.App.V6 at 1697-1703) The FBI agent serving the subpoena told Baker the reason for the subpoena was "that the PrimeTime telecast had mentioned mail fraud, and that's a federal crime." (Aplt.App.V4 at 1070)

17. On June 23, 1992, Plaintiff sent Defendants a letter advising them the allegations leveled by PT I were false and, as proof, enclosed the trial transcript and certain exhibits admitted into evidence in Word of Faith World Outreach Center Church v. Morales (Texas Attorney General), 787 F.Supp. 689 (W.D. Tex. 1992), rev'd, 986 F.2d 962 (5th Cir.), cert. denied, 114 S.Ct. 82 (1993), proving: (a) Holy Water sent to partners came from the River Jordan in Israel, (b) prayer requests could not have been found

in the garbage "at the bank and the marketing research center" and (c) Church's support of the Sullivans' Haitian orphanage. (Aplt.App.V6 at 1704-07) Defendants received and fully reviewed this contradicting information prior to PT II. (Aplt.App.V2 at 372, 586, 589)

**IV. Libels as asserted by Plaintiff.**

**A. Libel as asserted by Plaintiff: "Holy Water".** Tilton claims the Holy Water he sends to his viewers is from the River Jordan, but it is from Taiwan, thus Tilton is guilty of fraud and/or the crime of mail fraud. (Aplt.App.V1 at 55-56, 64-65; V2 at 615)

Words and images in context.

> SAWYER: [voice-over] Tilton sends out ... There's Holy Water from the River Jordan ***[Visual: vial of water on Church mailing]*** ... though Moore said some of the items come from that holy place, Taiwan.
>
> > Mr. MOORE: We get stuff from Taiwan. (Aplt.App.V4 at 1137-38; Aplt.T.Add. T1-T2)

Then the TV screen filled with the words "vial" "Jordan River" and "enclose your best gift." (Aplt.App.V6 at 1708) Mail fraud statute shown earlier sets up this libel. (Aplt.T.Add. T1-T2)

Proof of falsity. The Church enclosed vials of authenticated Holy Water from the River Jordan in some of its past mailings. (Aplt.App.V2 at 378; V4 at 993-1036) Before PT II, Defendants had the "numerous exhibits ... submitted and extensive testimony elicited [in Morales] to prove the vials of water [in Tilton's mailings] came from the River Jordan, not Taiwan." (Aplt.App.V2 at 373)

Proof of knowledge of falsity or reckless disregard as to truth or falsity ("actual malice"). On August 26, 1991, Gordon, Cooke and Anthony, using false pretenses and a hidden camera, interviewed Jim Moore, president of Response Media. (Aplt.App.V7 at 1709-1822; Aplt.T.Add. T18) While off-camera, Anthony asked Moore if they got inexpensive stuff from Taiwan. (Aplt.App.V4 at 1095) Later, Gordon asked Moore:

> RG: Where do you get all this stuff from?
>
> JM: What do you mean? Let me show you in here.
>
> RG: Well, you know, like the buttons. And I just saw you have like water--
>
> JM: Oh, we've got-- we've been doing this for so long that we've, we've got it down to, to science.
>
> RG: You've got storehouses?
>
> JM: Yeah. We get stuff from Taiwan. We get stuff from-- this is American Express where we do a die cut, personalized letter. That's-- We've done a lot of those. Well, you've probably gotten a lot of the mailings we've done. Six Flags, we do all their promotional mailings out of Atlanta. (emphasis added) (Aplt.App.V7 at 1766-1767; Aplt.T.Add. T18 at 1:01:00)

Defendants knew Moore was not referring to Tilton when he made the comment, "We get stuff from Taiwan", but was instead speaking very generally and, in fact, referred to other customers, American Express and Six Flags. (Aplt.App.V4 at 1094-96) Gordon's knowledge is shown later: "I would like to know, just out of curiosity, where they get the-- that Lord's water and a couple of other things." Upon leaving Response Media, Gordon stated, in

obvious disappointment, "I don't feel like we've got him nailed right now." and "I really wanted to get him to say that stuff is not from the River Jordan ... ." (Aplt.App.V7 at 1779, 1818, 1820; Aplt.T.Add. T18 at 1:10:19, 1:52:20, 1:54:05)

Gordon, in her August 27th memo, related how Tilton and his college buddies used to laugh "at the ministers who hawked ... Holy Water from the river Jordan." (Aplt.App.V5 at 1238) Their source, John Michael Taylor (the back-lit man) said nothing about Holy Water in his interview. (Aplt.App.V7 at 1827) On October 29, 1991, Sawyer interviewed John Bruegger of the U.S. Postal Service and asked:

> And if, in general, they say that all of this-- that the stuff they send out-- the, the Holy Water, and the anointing oils, and that the, the implication is it all comes from Jerusalem or near Jerusalem, but, in fact, it comes from Taiwan. (Aplt.App.V7 at 1855; Aplt.T.Add. T19 at 26:25)

Gordon said they never thought the Holy Water came from Taiwan. (Aplt.App.V2 at 373) Before PT II, Defendants had proof of that fact through the June 23, 1992 letters enclosing documents proving the water was from the River Jordan. (Aplt.App.V6 at 1704-07) They rebroadcast this segment without any corrections on July 9, 1992. (Aplt.App.V4 at 1161; Aplt.T.Add. T2)

Proof that viewers understood the gist as asserted by Plaintiff. The explicit understanding that the Holy Water came from Taiwan and Tilton was guilty of mail fraud is clearly shown by the federal Grand Jury subpoena served the day after PT I and the F.B.I. agent's statement to Baker: "the PrimeTime telecast had mentioned mail fraud, and that's a federal crime," and by newspaper articles and TV newsclips, including: "It suggested he buys vials of 'Holy Water' from Taiwan instead of Israel, as Tilton claims." and

"PrimeTime Live detailed mail fraud allegations against Mr. Tilton and his Farmers Branch church." (Aplt.App.V4 at 1070; V5 at 1378-79; V6 at 1697-1703. See also V5 at 1380-81, 1390-92, 1398-1401, 1403-05; V6 at 1693-96; Aplt.T.Add. T16) Dr. Lashner found viewers would undoubtedly understand from this segment that Tilton passes off Taiwan water as Holy Water from the River Jordan and is a fraud. (Aplt.App.V1 at 162)

**B. Libel as asserted by Plaintiff: "Missions-Haiti-Jones".** Tilton solicits money for a specific purpose, an orphanage in Haiti, but does not support the Haitian orphanage, that Tilton engages in all of the illegal and reprehensible conduct ascribed to Bob Jones in Haiti and thus Tilton is guilty of fraud and/or the crimes of money laundering and mail fraud. (Aplt.App.V1 at 55, 57, 67-70; V2 at 615)

Words and images in context. Sawyer states: "So we took a close look at three ministers to see if the things being said and implied on the air are true." In the opening and "Grant" segments, Sawyer asks, "He [Grant] does nothing for your children?" and Haitian doctors answer "No." Bob Jones, who runs an orphanage associated with Grant in Haiti, shows how evangelists can put up a temporary sign to claim an orphanage and discusses fraudulent fund-raising. Jones and wire fraud are the focus of most of the Grant segment. (Aplt.App.V4 at 1116, 1146, 1114, 1122-26, 1144, 1151-53, 1168; Aplt.T.Add. T1-T2) Then in Tilton's segment:

> SAWYER: [voice-over] And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these, his missions around the world. . .
>
> And what about this mission, Tilton's orphanage in Haiti? ***[Visual: a man leading children out of a building in front of two signs, one:***

***"Childrens Shelter" and the other, "Sponsored by Robert Tilton Ministries"]***

PT I: We kept thinking about Bob Jones and how he told us you could just fix yourself up a sign and claim an orphanage.

PT II: Well, remember Bob Jones who told us for just a few thousand a month, we could put up a sign and claim an entire orphanage, even if we weren't the only contributor?

Both: BOB JONES: Put your name on there, whatever you want.

ANNOUNCER: . . .at the World Harvest Orphanage. . .

SAWYER: [voice-over]

PT I: Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no.

PT II: So even though his magazine calls it the Robert Tilton Ministries Children's Home, it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage.

Both: [interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No. (Aplt.App.V4 at 1138-39, 1162; Aplt.T.Add. T1-T2)

The visual image of Sawyer questioning Haitian officials mirrors her questioning of Haitian doctors in Grant's segment. The entire broadcast must be reviewed. (Aplt.S.App. at S108-S110) Dr.

Lashner describes the context for the creation of this libel. (Aplt.App.V1 at 184-187)

Proof of falsity. Neither Tilton nor his Church ever claimed to own an orphanage in Haiti, but the Church did sponsor and was a major contributor to World Harvest Orphanage, owned by its directors, the Sullivans. Except for one 1985 letter seeking contributions to support Haitian orphans, the Church has not solicited funds for any mission or project. (Aplt.App.V2 at 378) Tilton didn't know Jones. (Aplt.App.V4 at 1064)

Proof of actual malice. Gordon's July 23, 1991 memo states: "We don't expect to find out his missions are non-existant [sic] ... ." (Aplt.App.V5 at 1258) On August 26th, Moore told Gordon, Cooke and Anthony that Tilton "doesn't raise money for missions, he just does it" and that Tilton "has never raised money for a specific project." (Aplt.App.V7 at 1805, 1763; Aplt.T.Add T18) Gordon's August 27th memo reflects (1) her plan to use Grant and Lea who were "more obvious in their fraud (and more sloppy)" to get the viewers "angry at the fraud these guys get away with" and to show Grant's use of a temporary sign for a Haitian mission he only supports nominally, to be immediately followed by a reference to Tilton, and (2) her recognition Tilton "claims to sponsor" a mission in Haiti - "It's not his mission, he just gives a donation to the mission" and Moore's denial of raising money for a specific purpose. (Aplt.App.V5 at 1234, 1237, 1241) Yet Sawyer tells the viewers Tilton claims to own it by stating: "his missions," "Tilton's orphanage," "his Haiti orphanages," "Tilton's orphanages," "it's really not Tilton's place at all," "the ones he implies are his own." (Aplt.App.V4 at 1138, 1162, 1168)

On September 5, 1991, Gordon sent Sutherland a list of questions to use in Haiti including "can he come dn and take pictures w/kids; can he put sign on bldg for pix, etc?" (Aplt.App.V7 at 1858) On September 13th, Gordon asked Jones about putting up a

temporary sign to lead Jones to say what was shown on the broadcast in full in the Grant segment and in part in the Tilton segment: "In Dallas, fix you up a sign on a canvas, roll it out, 'Welcome to Haiti,' put your name on there, whatever you want ... ." (Aplt.App.V4 at 1124, 1138, 1152, 1162; V7 at 1861-62; Aplt.T.Add. T20 at 06:18) After Sutherland, Gordon and Cooke left Jones' place, they looked at their blowups of the Church magazine pictures of the Haitian orphanage with sign "SPONSORED BY ROBERT TILTON MINISTRIES" and made comparisons between the pictures and Jones' statement: "You know, I mean-- He said exactly what it was. He said, 'Get a thing, we'll roll it up and string it up and get the kids all to sit in front of it.' You see?" (Aplt.App.V7 at 1864; Aplt.T.Add. T20 at 30:20)

Before Sawyer went to Haiti, Sutherland had already determined that World Harvest Orphanage was not registered with the government. (Aplt.App.V1 at 293-296, 299) Sutherland learned that out of 700 orphanages in Haiti, only 148 were actually registered. (Aplt.App.V7 at 1865-67) When Sawyer interviewed the Haitian government official, Defendants were fully aware that 80% of all orphanages, including World Harvest Orphanage, would not be on the government's lists and, even if not registered, "it was legal." (Id.)

On September 16, 1991, Scott Hortop, on behalf of the Defendants, wrote Marvin Crow, missions director stating, "I recently saw mention in your promotional literature of your support of Children's Hope Center ... ." (emphasis added) (Aplt.App.V7 at 1868) On October 23rd, Sutherland received Crowe's response regarding "our support of a childrens home in Haiti. We send funds for this work through the Founding Directors, Rev. and Mrs. Lee Sullivan" with their address. (emphasis added) (Aplt.App.V1 at 298, 300; V7 at 1869-70) On October 24th, Gordon wrote Sawyer "RE: Postal Service interview & Justice Dept (wire fraud)" noting:

> ... that even if a minister solicits donations for a designated cause only through television, the post office gets involved if the money that comes in for the project comes in through the mail ... It's our understanding that the business of making it look on the books like all the money raised for designated cause went to that cause is a postal/wire fraud concern ... so that's why I gave you the tape of Bob Jones to show them. (Aplt.App.V7 at 1871-72)

Gordon, Sawyer and Sutherland always believed Tilton was supporting, to some extent, an orphanage in Haiti, yet told the viewers he implied he "owned." (Aplt.App.V1 at 282; V2 at 351; V4 at 1168; V7 at 1874-75; V8 at 2181) Gordon "never believed that Bob Jones was affiliated in any way with Tilton." (Aplt.App.V2 at 350) Gordon claims the reference to Mr. Jones "was simply to question the possibility" that Tilton's Church was doing what Grant did. (Id.) Sutherland's notes reflect "no fraud to be had on this guy = can have fun w/ him though." (Aplt.App.V5 at 1227-28)

Defendants knew how this segment was perceived. Before PT II, Gordon noted "[Tilton] doesn't ask for anything for charities. No promises." (Aplt.App.V7 at 1876; V8 at 2096) Two weeks before PT II aired, Defendants received the letter enclosing trial transcript and exhibits from Morales proving the Church's extensive long-term monthly Haitian orphanage support. (Aplt.App.V6 at 1704-07; V4 at 919-921, 1037-38) Anthony testified in Morales that he furnished ABC with Jones' name and Jones had no connection with Tilton. (Aplt.App.V4 at 990-991) Defendants ignored this information, rebroadcasting essentially the story they had created. (Aplt.App.V4 at 1144, 1151-52, 1162-63; Aplt.T.Add. T2)

Proof that viewers understood the gist as asserted by Plaintiff. Viewers' perceptions agree with Tilton's asserted libel as demonstrated in various newspaper articles, including: "The ABC

program suggested that Mr. Tilton is not sending money to an orphanage in Haiti, as he claims," "Robert Tilton also claims orphanages in Haiti, but again, there were none there," "Tilton ... does claim to sponsor ... a Haitian orphanage ... The ABC-TV report charged that the orphanage is a front, and that no children are actually helped by Tilton's ministry," (Aplt.App.V5 at 1381-84) and viewers' letters such as:

> Ever since I saw your sign on the orphanage ... and heard it was your "MISSION FOR THE MOMENT" as I call it ... and you paid them to put up your sign and take pictures; then left, I say you are 'just one more mortal 'using the NAME OF GOD to "prosper." ... In return for my forgetting HOW BADLY I FEEL (we, in fact in my whole family) feel, about what you did (with the orphanage misunderstanding-on-purpose?)... You decreased our faith in all those who bragg and ADVERTISE HEARTILY THAT THEY SUPPORT "CHILDREN!" ... 8(capitalization and underlining in original). (Aplt.App.V6 at 1406-07. See also V6 at 1678, 1681, 1690-91)

C. **Libel as asserted by Plaintiff: "Back-lit man".** Tilton created or devised a scam when he was in college, with his college friend shown back-lit, on the PrimeTime broadcasts to set up a phony ministry, and prey on people and get rich. Entire ministry is a scam. (Aplt.App.V1 at 57-58, 72-73; V2 at 615)

Words and images in context. In this segment, Defendants presented a man, back-lit so the viewers couldn't see his face and lips and "see" what he was saying:

> SAWYER: [voice-over] This man ... is ... old friend of Robert Tilton...

[RADIO MUSIC PLAYING]

RADIO ANNOUNCER: You're listening to XERF, the ... ***[Visual: black and white film of college campus]***

SAWYER: [voice-over] He remembers when they were in college, they would use drugs or get drunk and go off to tent revivals as a kind of sport.

FORMER TILTON FRIEND: And we'd be drunk and go down front, fall to our knees, speak in tongues. [PT I only: I think that anybody who was there would realize that some people are going to believe anything and all you have to do is capitalize on that belief.]

• • •

SAWYER: [voice-over] But he never tells followers how he and his friends talked about running preacher scams and cashing in.

FORMER TILTON FRIEND: We said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section, and fly around the country and get rich.

TILTON: We sold everything that we had, bought an old ragged tent and a big old truck and a travel trailer and we headed out tell people about this gospel of Jesus. (Aplt.App.V4 at 1139-40, 1163-64; Aplt.T.Add. T1-T2)

Proof of falsity. Tilton was not an "old friend" of Taylor's. Tilton never attended North Texas State. Tilton never went to any tent revivals while in college. During college, Tilton had no aspirations to become a preacher or run a "preacher scam," nor did he discuss this possibility with anyone. (Aplt.App.V2 at 377-78) Tilton graduated from high school in 1964. (Aplt.App.V7 at 1877; V2 at 381-82)

Douglas McLeod and Mike Harbison attended North Texas State with Taylor. (Aplt.App.V8 at 2120, 2162) McLeod, who graduated in the Spring of 1965 from North Texas State in Denton, Texas, specifically recalls the tent revival incident occurring in the Summer of 1963 in Denton. McLeod says the preacher fad lasted six or eight months and by 1964, he had stopped doing it. McLeod never knew Tilton. (Aplt.App.V8 at 2162-64) Harbison, who attended North Texas State from 1963 to 1965, says McLeod either started the "tent revival" bit or was in it from the beginning, that the preacher fad lasted "six months, nine months, a year or whatever," that he can't place Tilton at a tent revival or recall his specific involvement. (Aplt.App.V8 at 2120, 2123-25) The "back-lit man," in response to a direct question, said he couldn't swear that Tilton ever "actually went down to the front, and fell on his knees, and quaked, and spoke in tongues ... ." (Aplt.App.V7 at 1828; Aplt.T.Add. T21)

Proof of actual malice. Gordon intended this segment to show Tilton's ministry was a sham from the start - "The purpose ... was to provide some history on Tilton and to question, in light of this history, his present sincerity." (emphasis added) (Aplt.App.V2 at 355) Her August 27th memo said that it would be an overall "picture ... the making of a machine." (Aplt.App.V5 at 1234) The "back-lit man" segment was conceived from incidents that actually happened according to Taylor, Harbison and McLeod. (Aplt.App.V7 at 1826-30, 1838-39; V8 at 2120-25; 2162-64) Gordon's initial

script showed that they occurred in Denton, Texas and the Rough Final Script concurs by stating it happened "when Tilton was a college student at North Texas State." (Aplt.App.V5 at 1238, 1375) Defendants had no evidence Tilton ever went to North Texas State. Defendants knew Tilton graduated from high school in 1964, then attended Texas Tech in Lubbock, Texas. (Aplt.App.V7 at 1877) Taylor graduated from high school in "sixty or sixty-three" and described Tilton as being a "youngster." (Aplt.App.V7 at 1825) Sometime between the Rough Final Script (sent out on November 18th) and PT I, Defendants cut out of the script that Tilton went to North Texas State. (Aplt.App.V4 at 1139; V5 at 1375)

Defendants' raw footage shows that they edited and changed what the "back-lit man" actually said, from "I said that when we graduated," to the broadcasts' "We said" to include Tilton. (Aplt.App.V7 at 1827; V4 at 1140; Aplt.T.Add. T21) Sawyer testified she would not have made that edit. (Aplt.App.V8 at 2179) Kaplan said the "we" in the broadcast meant Tilton and the "back-lit man" and changing the "I" to "we" would change the meaning of that sentence and would not be proper editing. (Aplt.App.V8 at 2136-37) Similarly, Sawyer used the statement "we'd be drunk and go down front," aware that the "we'd" would be understood by the viewers to be Tilton and the "back-lit man" when Defendants knew the "back-lit man," in response to a direct question, said he couldn't place him there. (Aplt.App.V4 at 1139, 1163; V7 at 1827)

The "back-lit man" was Gordon's only source for the specific incidents he described that were included on both broadcasts. (Aplt.App.V2 at 355) Gordon now states she "did not percieve [sic] any indication that Mr. Taylor had any reason or motive to be anything but entirely truthful in his recollections." (Aplt.App.V2 at 354-355) But during the interview, Gordon noted that Tilton could probably argue the "back-lit man" was jealous of him, and the "back-lit man" later expressed his feelings toward Tilton: "I despise [what

he's doing]. He makes me sick." (Aplt.App.V7 at 1831, 1836) Throughout the interview, Gordon repeatedly interrupted the "back-lit man's" reverie of his group's escapades with questions about Tilton's actual participation. (Aplt.App.V7 at 1823-40; Aplt.T.Add. T21) The "back-lit man's" answers were generally evasive and ambiguous. (Id.) Defendants knew the "back-lit man" never said anything specific that Tilton did - just that he ran with a group that had done those things. (Id.)

The day after PT I, Tilton unequivocally denied the "back-lit man" segment on his broadcast which Defendants taped: "I never even thought about preaching in college ... that was a total fabricated lie." (Aplt.App.V7 at 1883-84; Aplt.T.Add. T22) There is no evidence that Defendants attempted to verify their construction of what the "back-lit man" said before airing PT II. Omitting one sentence, Defendants rebroadcast this segment, knowing they had falsely edited it and it was false to start with. (Aplt.App.V4 at 1145, 1163-64; Aplt.T.Add. T2)

Proof that viewers understood the gist as asserted by Plaintiff. Viewers understood that Tilton was a sham from the start: "... blocked out your longtime friends face. But he was telling all about ... you and he found out how to talk in tongues ... and other con games you were pulling on the people ..." (Aplt.App.V6 at 1408; See also V6 at 1409-15) That is how Dist. Ct. Judge Thomas Brett saw it. After seeing PT II for the first time at the hearing on the preliminary injunction, Judge Brett reacted to the "back-lit man" segment recognizing that "we" implied the "back-lit man" and Tilton:

> [T]his gentleman that came forth in the dark here and said something to the effect that he was an old college buddy of Reverend Tilton's and they used to make a lot of Jesus rap talk and attend these tent revival salvation type meetings and carry on a lot of theatrics concerning it and talking about at some

> point in time maybe they'd get them a tent and go out and make some money in the same way.
>
> • • •
>
> I know what the facts of that fellow are and that's a pretty damning piece in this thing of being a suggestion that one implication of his talk is the entire Tilton ministry is nothing more than a carrying out in the future of their early fraudulent plans. (emphasis added) (Aplt.App.V4 at 1110-1111)

Later, Judge Brett noted: "Implicit in [Taylor's] statements is that Tilton and his present evangelistic organization stems from this insincerity and is essentially a scam." (Aplt.App.V1 at 26) No one but the Defendants knew of the editing change from "I" to "we" at that time, certainly Judge Brett did not know.

**D. Libel as asserted by Plaintiff: "Beebe".** Tilton is connected with organized crime and drug smuggling and that he personally got money from a person connected with organized crime and drug money. (Aplt.App.V1 at 58, 73; V2 at 616)

Words and Images Published by Defendants.

> SAWYER: [voice-over] ... by nineteen eighty-one, he had hit the big time. How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a one point three million dollar loan, though Tilton claims he never met the man. And after Tilton got the money, he got a new image, too: a permanent wave for his hair, plastic surgery ... (Aplt.App.V4 at 1140, 1164; Aplt.T.Add. T1-T2)

As Sawyer says: "PrimeTime has learned ..." Defendants create and show a picture of Tilton and Beebe with their shoulders overlapping

then scroll behind the created picture a series of newspaper articles on Beebe's criminal endeavors. As Sawyer says: "banks gave Tilton ... loan" the image of a pile of money with "1.3 million" superimposed moves from Beebe to Tilton. (Id.)

Proof of Falsity. Tilton did not "court" Beebe "for several years", but met him once or twice when negotiating a Church loan. Tilton was not aware that Beebe had any connections with the Mafia or drugs before getting the loan. (Aplt.App.V4 at 1077-78, 1080) The Church, not Tilton, obtained the loan from a bank in April or May 1980 and the loan was paid off on November 22, 1982. (Aplt.App.V7 at 1885-86) The picture of Tilton and Beebe side by side was deliberately created by Defendants. (Aplt.App.V7 at 1887) Tilton never denied meeting Beebe. (Aplt.App.V4 at 1081)

Proof of Actual Malice. Defendants researched extensively the Tilton-Beebe relationship only to come up, 600 pages of research later, with no link. (Aplt.App.V1 at 175; V8 at 2092A, 2196) Defendants knew that Tilton's record was impeccable for the last 17 years. (Aplt.App.V7 at 1888) No evidence existed showing Tilton and Beebe had anything other than a Church bank loan relationship and Defendants weren't certain as to whether or not a friendship existed. (Aplt.App.V1 at 179-180; V7 at 1889). Defendants knew from the newspaper article and their review of Dallas land records that the loan was made to the Church, not Tilton, and was repaid two years before Beebe's indictment. (Aplt.App.V7 at 1885-86, 1890-1891; V8 at 2195) Defendants showed, on the broadcasts, a news article which stated that "Tilton ... said through a spokeswoman that he never met Beebe," but Sawyer tells the viewers: "though Tilton claims he never met the man." (Aplt.App.V7 at 1885-86; V4 at 1140, 1164; Aplt.T.Add. T1-T2) Under Sutherland's guidance, Defendants took an "old" photo of Tilton and a photo of Beebe to create a picture of the two men's shoulders overlapping, giving the

impression that they were standing side by side. (Aplt.App.V7 at 1887; Aplt.T.Add. T1-T2)

Proof that viewers understood the gist as asserted by Plaintiff. Viewers understood that despite the closeness of Beebe and Tilton, Tilton denied knowing Beebe as shown in a viewer's letter: "Then to deny that he received a loan from that guy." (Aplt.App.V6 at 1416) The program creates a context generating clear and unmistakable inferences of an unholy compact between Tilton and Beebe whereby Tilton's ministry would become a channel for laundering Beebe's drug smuggling money. (Aplt.App.V1 at 178)

**E. Libel as asserted by Plaintiff: "Prayer Requests".** Tilton solicits prayer requests from people, says he will receive them and pray over them, but instead has the Bank and the mail processing center throw them in the garbage and thus Tilton is guilty of fraud and/or the crime of mail fraud. (Aplt.App.V1 at 55, 66-67, 73-74; V2 at 616)

Words and images in context.

> SAWYER: [voice-over] ... You'll see how the businessman deposits followers' money directly into the bank, but has a shocking place for their prayers and dreams. (Aplt.App.V4 at 1115, 1145; Aplt.T.Add. T1-T2)
>
> • • •
>
> SAWYER: [voice-over] And those items that people have prayed over and sent in, believing Robert Tilton would [PT I: take; PT II: touch] them and pray over them too? If some make it to Tilton, there are thousands that didn't. We found them in the garbage at the bank and the marketing research center. ... The money probably made it to Tilton.

> The prayers went in the trash. (Aplt.App.V4 at 1142, 1166)

Images included (1) the dumpster shown at the (PT I: main; PT II: branch) Bank while Sawyer says "shocking place for their prayers and dreams." and "We found them in the garbage at the bank" and (2) a robotic camera shot of nine different Margaret Sutherland mailings while Sawyer says "If some make it to Tilton, there are thousands that didn't." (Aplt.T.Add. T1-T2)

Proof of falsity. The Church had in place numerous safeguards and controls to insure that the mail would be processed properly and that prayer requests would not end up "in the garbage at the bank and the marketing research center." (Aplt.App.V4 at 1099-1109, 1174-1224) The Bank and IDM's officers and employees and the independent cleaning companies that serviced the Bank and IDM have all testified that no prayer requests were ever intentionally thrown away. (Aplt.App.V7 at 1892-98; V8 at 2064, 2066, 2109, 2111-12, 2140, 2142-54, 2156-58E, 2160) Mark Buntz of Arthur Anderson & Co., Tilton's expert witness at the preliminary injunction hearing, testified that with the practices and procedures in place, nothing was ever thrown away at the Bank and no prayer requests were ever thrown away at IDM. (Aplt.App.V4 at 1099-1109, 1174-1224)

The documents in Defendants' possession which they claim to have found in the garbage are: prayer requests which were stolen by Defendants' agents from either the Bank or IDM and planted in the garbage, Church mailings sent to names covertly placed on the Church's mailing list which were never returned to the Church but planted in the garbage or alleged to have been found in the garbage, Church mailings given to Defendants by people assisting Defendants and white mail stolen by Defendants' agents from the Church or the Bank. (Aplt.App.V5 at 1261-96; Aplt.T.Add. T23)

At most, 37 original Church mailing prayer requests were ever produced by Defendants or their agents. (Aplt.App.V5 at 1261-96) Buntz testified the only way those documents could have been in the garbage at the Bank or IDM was for them to have been stolen and planted in the garbage. (Aplt.App.V4 at 1099-1109) Because of the Church's sophisticated mail-handling system, Tilton can, through documentary evidence, prove that Defendants concocted their trash sweep findings allegedly contained in the Tilton Evidence Log[5]. (Aplt.App.V4 at 1099-1109, 1174-1224; Aplt.App.V5 at 1261-96) Except for prayer requests which were to be sent to Tilton and white mail, IDM retained everything with a member's number and/or name, including reply envelopes for at least four months. (Aplt.App.V4 at 1046-48; V8 at 2142-42A) Tilton has the original envelope for all 37 original Church mailings which are in the possession of the Defendants and can prove when each was mailed by postmark. IDM keeps detailed computer records on every piece of mail the Church receives. The postmarks and computer records prove the "Tilton Evidence Log" is fraudulent. (Aplt.App.V4 at 1187)

Examples are: (1) Morton prayer request which was supposedly found in the garbage at the Bank one month before she ever mailed it (Aplt.App.V4 at 1056-57; V5 at 1261; V7 at 1199), (2) McLaurin prayer request which was allegedly found in the garbage at the Bank, eight days before she ever purchased the money order enclosed therein and ten days before it was received at the Dallas Post Office. (Aplt.App.V4 at 1049-55, 1084-1085, 1087, 1200; V5 at 1262) and (3) Matilda McDuffie, original envelope postmarked on July 12, 1991; Wilfred Casey, original envelope postmarked on June 10, 1991; and David Bray, original envelope

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[5] The "Tilton Evidence Log" to verify the date, location and person present when trash was found. (Aplt.App.V8 at 2012-15, 2028-29)

postmarked on June 12, 1991. All three of these envelopes share similarities which include Bank markings made in the same ink color and handwriting; the amounts noted by the Bank ($0.67, $11.23 and $2.00) are not compatible with those Church members' giving records; an "LU" ("Look Up") notation written by IDM signifying there was no partner mailing bearing the partner's number in the envelope when it reached IDM. (Aplt.App.V4 at 1100-01; V5 at 1263-65) These three original Church mailing prayer requests in the Defendants' possession bear the member's number and show an amount consistent with the member's giving record. (Aplt.App.V4 at 1058-60; V5 at 1263-65) The envelopes were postmarked in June or July but were planted back into the Church's mail processing system at the Bank in September. (Aplt.App.V4 at 1202, 1208-09; V5 at 1263-65)

Proof of actual malice. At the end of PT I, Sawyer introduces Anthony as a "minister" (Anthony has stated he is not a minister) and credits him with "help[ing] us gain access to key parts of this investigation." (Aplt.App.V4 at 1142; V8 at 2047; Aplt.T.Add. T1) Peggy Wehmeyer, ABC's religious editor trusted by Kaplan and Sawyer, advised Defendants at the outset that Anthony was "totally untrustworthy." Sutherland told Defendants that Anthony had a "real ax to grind," was "obsessed" with Tilton and she didn't "feel totally comfortable with Ole Anthony either - on crusade against [Tilton] in name of Christ." (Aplt.App.V7 at 1899-1900; V8 at 2134, 2177). Defendants had other reasons to believe they had been "duped" by Anthony. (Aplt.App.V7 at 1901)

The first trash sweep occurred on September 9, 1991, after Defendants made the decision to go through the trash dumpsters. (Aplt.App.V8 at 2062, 2026) Anthony, Holloway and Guetzlaff allegedly went through the garbage at five different locations, including the main Bank, and removed garbage from those dumpsters while under Gordon's constant direction. (Aplt.App.V8 at 2018-23,

2025; 2044; 2129) Anthony testified he was present on all trash sweeps and Gordon and Cooke, "as a photographer"[6] (Aplt.App.V5 at 1309), were present on more than one trash sweep (most of which took place at night) and believed ABC employees actually dug through the trash with him. (Aplt.App.V2 at 340; V5 at 1306-33; Aplt.App.V8 at 2074) Holloway and Guetzlaff testified Anthony was not present on all trash sweeps although he was in Tulsa on those occasions and they were directed at "specific times ... to a specific location." (Aplt.App.V8 at 2115, 2117, 2127) Guetzlaff took Anthony to the hotel where Defendants' employees were staying one evening, left him and then picked him up the following morning. (Aplt.App.V5 at 1333; V8 at 2114-15, 2117)

Holloway, Guetzlaff or Anthony testified they labelled the trash bags by location and date. (Aplt.App.V8 at 2054, 2118, 2131) Immediately following the November 21, 1991 broadcast, Defendants learned that none of Tilton's mail went to the main Bank that was shown on PT I. (Aplt.App.V7 at 1902, 1904-05; Aplt.T.Add. T10) Knowing this, on December 6th, Gordon had Anthony bring the Tilton-related sorted trash from Dallas to her on the East Coast and while being filmed, Gordon deliberately commingled the trash, thus creating an alibi for showing the wrong bank in the broadcast. (Aplt.App.V8 at 2055-60) Kaplan's testimony confirmed Gordon's action was against ABC's policy by stating: "Once a story becomes controversial ... you're supposed to keep the documents. In fact, if there's legal action, the attorneys will call you and say, now, keep everything, destroy nothing." Knowing this was going to be a controversial story from the day he said go with it, Kaplan "assume[d] that the producers would have kept key documents ... ." (Aplt.App.V8 at 2138)

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[6] Not a single nighttime still photograph nor video film was ever produced by Defendants showing Church trash being removed from a dumpster.

Following Gordon's commingling, the IRS put Bates numbers 1 to 4,999 on the trash and Trinity Foundation put on the 5,000 series Bates numbers. (Aplt.App.V8 at 2033-35) All the original Church mailing prayer requests in Defendants' possession bear a 5,000 series Bates number. (Aplt.App.V5 at 1261-96) Anthony then had the Tilton Evidence Log prepared which shows all 37 prayer requests found at the branch Bank and IDM - none at the main Bank or other trash run locations. (Aplt.App.V8 at 2016-17, 2049-50) The Church produced to the Defendants, from the stored trash at IDM, the original carrier envelopes for the 37 prayer requests. (Aplt.App.V4 at 1099-1109; V5 at 1261-96) After Defendants' attorneys' review of the envelopes proving the Tilton Evidence Log bogus, they informed Anthony of the errors and the trash commingling. (Aplt.App.V8 at 2051-52) The commingling alibi for showing the wrong Bank does not explain the errors in the Tilton Evidence Log because if the prayer requests were truly commingled, (1) the log would have shown prayer requests found at all five garbage locations as opposed to just the branch Bank and IDM and (2) the prayer requests would have had a mixture of Bates numbers on them as opposed to all being marked with a 5,000 series number.

Defendants knew that the Church mailings portrayed on the broadcast as found in the trash while Sawyer says "If some make it to Tilton, there are thousands that didn't" had never been prayed over, sent back in or found in the garbage because they were mailings sent by the Church to Margaret Sutherland. (Aplt.App.V8 at 2183-84; Aplt.T.Add. T1, T2, T23) Defendants also knew the white mail, shown as Sawyer says "We found heart-breaking appeals ...," was not found "in the garbage at the bank or the marketing research center" because Defendants obtained it from their people in Dallas which they had caused to be placed on the Church's payroll or who posed as Church members. See p. 5-6, supra.

Defendants knew they did not have the "thousands" of prayer requests claimed on the broadcasts. Defendants tried to make it appear that there were more documents in their possession than there were. Gordon instructed Sutherland to "meet up with ole - reshoot trash piled on one desk with prayer cloth and mailbacks on top - make look voluminus [sic]" and "shoot trash on floor from ... bottom up." (Aplt.App.V7 at 1907) Even though Sutherland testified regarding the "enormous number of prayer requests" found in the garbage, she complied with the "make look voluminus" request on November 5, 1991 and proceeded to (1) place a small number of "mailbacks" on top of a thick computer run and a collapsed box with a portion of one mailback tucked under the computer run to disguise it and (2) have the cameraman shoot the small pile of trash from different camera angles including one from the floor looking up with a chair in the near background in an obvious attempt to make the trash pile appear to be as high as the arm of the chair (Aplt.T.Add. T24; Aplt.App.V1 at 292)

Proof that viewers understood the gist as asserted by Plaintiff. The viewers' perception of the gist is apparent through press and public reactions to the PrimeTime broadcasts shown in news articles: "'PrimeTime Live' ... alleged Tilton committed mail fraud and never received mailings he had promised to bless. The program said the mailings instead were tossed in a trash dumpster ... ." (Aplt.App.V5 at 1380) and viewer's letters: "letters ... reached the bank ... money was removed ... then thrown into a dumpster ... don't see the neccessity [sic] of you asking me what my prayer needs are if they wind up in a dumpster before you see them." (Aplt.App.V6 at 1417-18. See also: V5 at 1379, 1382, 1385-92, 1398, V6 at 1419-27, 1671-79, 1682-85, 1690-91)

F. **Libel as asserted by Plaintiff: "No"**. Tilton admits he is a liar. Defendants create the question and then use an unrelated

film clip to have Tilton answer the question admitting he is a liar. (Aplt.App.V1 at 70; V2 at 616)

Words and images in context. In the introduction, Sawyer states: "So we took a close look at three minsters to see if the things being said and implied on the air are true." (Aplt.App.V4 at 1146; Aplt.T.Add. T2) On PT II, the ABC announcer's voice-over says: "-- one of the most popular televangelists in the business, Robert Tilton. Eight months later, are his followers getting the full story?" What is shown is a clip of Tilton shaking his head and saying "no." (Aplt.App.V4 at 1158; Aplt.T.Add. T2)

Proof of falsity. The clip was edited from Tilton's video deposition in Morales, Tilton was answering the question "Does the church maintain a shelter for abused women?" (Aplt.App.V8 at 2191; Aplt.T.Add. T25)

Proof of actual malice. Defendants obtained Tilton's video deposition and took a clip out of context to show Tilton answering "no" to a question he was not asked. Defendants created this entire segment; they knew it was false.

G. **Libel as asserted by Plaintiff: "Guatemala Mission"**. Tilton is a liar in that he says he supports a Guatemalan mission 100% of their needs and does not. (Aplt.App.V1 at 75; V2 at 617)

Words and images in context. PT II presents a clip from Tilton's deposition in Morales:

> SAWYER: [voice-over] And what about something else Tilton said in his deposition? He claims that his contribution to his mission in Guatemala is one hundred percent of their needs.
>
> ATTORNEY: - that you were going to provide-

TILTON: We would be-

ATTORNEY: - a hundred percent of the support that they needed to maintain their operation.

TILTON: [Nodding head] Yes. Yes.

SAWYER: [voice-over] So we checked this out. We spoke to the on-site missionary in Guatemala who told us, in fact, Tilton is only a partial sponsor. (Aplt.App.V4 at 1169; Aplt.T.Add. VT-2)

As Sawyer says, "who told us ..." the screen shows turning reels of a tape recorder and in quotes:" (Other organizations) cover all expenses for operations ... ." (Aplt.App.V4 at 1169; Aplt.T.Add. T2)

Proof of falsity. The full text of the portion of Tilton's video deposition from which the broadcast clip was taken:

Q In Guatemala, your tape says that you have twelve schools?

A Emm hmm.

Q And are those schools that are fully maintained and supported by Word of Faith?

A Indirectly. Once again, it's a ministry that helps children and stuff and we send money to them and then they disburse it.

Q But do you send enough to maintain the entire--

A Absolutely.

Q --operation?

A Absolutely. That was our understanding when we did it. Once again, if these people

are getting extra money, I'm certainly not going to tell them not to.

Q Emm hmm.

A But we-- when we negotiated or when we outlined what we were going to do, it was for full time help, but if they get extra stuff, you just don't stop them from--

Q No, but--

A --getting extra stuff.

Q But your idea was that you were going to provide--

A We would be--

Q --a hundred percent of the support that they needed to maintain their operation?

A [NODDING HEAD] Yes, yes. (Aplt.T.Add. T26)

Proof of actual malice. Defendants knew Tilton did not "claim that his contribution ... is a hundred percent of their needs" (emphasis added) because they had the videotape in which Tilton clearly stated his intention was to fully maintain and support the schools and his recognition that they might be getting extra money somewhere else. (Aplt.App.V8 at 2192-93. See also Aplt.S.Add. at S123-24) Defendants edited the videotape of Tilton's deposition to make it say that which it did not say.

**H. Libel as asserted by Plaintiff: "Inauguration".** Tilton is a liar in that he said he was invited to the inauguration by the president of Guatemala and was a personal friend of the president of Guatemala. (Aplt.App.V1 at 75-76; V2 at 617)

Words and images in context.

SAWYER: [voice-over] ... And the Guatemalan government has gone public to say that Tilton and

his promotional material *[visual: Church magazine]* exaggerate his contribution for personal gain, including his claim of a special invitation.

> Rev. TILTON: [television broadcast] I've been invited to be in the inauguration, the ball, all the celebrations and-
>
> SAWYER: [voice-over] That's not true, according to the president's spokesman, Fernando Muñiz.
>
> FERNANDO MUÑIZ invited him to attend the inauguration is by all means false, nor does he have any relation with the government. But we cannot take action against a swindler of this caliber. (Aplt.App.V4 at 1169; Aplt.T.Add. T2)

Proof of falsity. It is undisputed that Tilton received invitations to and attended the inauguration and reception. Muñiz testified that copies of Tilton's invitations appeared to be government-printed. (Aplt.App.V7 at 1908-09; V8 at 2170) Neither Tilton, nor any Church publication, ever said the invitation was from the president or that Tilton was a friend of the president. (Aplt.App.V7 at 1910-12; Aplt.T.Add. T27)

Proof of actual malice. Despite knowing that neither Tilton nor his magazine claimed to receive an invitation from, or friendship with, the president, Gordon falsely stated such as fact in a June 9, 1992 memo. (Aplt.App.V7 at 1913-17) Defendants prepared a list of questions for Muñiz which also presented that as fact. (Aplt.App.V1 at 308-309; V7 at 1918-19) Cowan's notes show the drafting of questions to replace "government" with "president." (Aplt.App.V7 at 1920-21) Before talking to the president, the only information Muñiz had about Tilton was what ABC told him. (Aplt.App.V7 at 1922-25; V8 at 2171) Muñiz told Defendants the invitation list was

very extensive - he didn't remember it or "know whether there was a missionary [on it], it's very probable." (Aplt.App.V7 at 1926-29)

I. Libel as asserted by Plaintiff: "India". Tilton told his followers that they paid for the crusade: Tilton is a liar in this regard because there was Tilton in India taking money every night from the poorest people on earth, instead of being an evangelist attempting to convert those people to Christianity. (Aplt.App.V1 at 76; V2 at 617)

Words and images in context. "We took a close look at three ministers to see if the things being said and implied on the air are true." (Aplt.App.V4 at 1116, 1146) PT II includes:

> SAWYER: [voice-over] And something else about Tilton the missionary. Repeatedly, he tells his viewers that their donations enable him to win souls around the world.
>
> > TILTON: [television broadcast] And we totally - Word of Faith Ministries, you, the Family Church, underwrites totally this particular evangelism unit.
>
> SAWYER: [voice-over] Tilton tells followers they finance crusades in countries too poor to pay themselves.
>
> . . .
>
> SAWYER: [voice-over] So PrimeTime decided to follow Robert Tilton to India this past March.
>
> . . .
>
> SAWYER: [voice-over] Well, there was Tilton, passing the collection plates nightly. If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars ... money

> taken from the people he himself calls "the poorest people on earth." (Aplt.App.V4 at 1170-71; Aplt.T.Add. T2)

What the viewers see on their TV screens and hear in the background as they listen to Sawyer's voice-over, "Well there was Tilton, passing the collection plate nightly," is Tilton preaching on stage while a woman passes a collection basket. (Aplt.T.Add. T2)

Proof of falsity. The Church spent $307,000 in India on the 1992 crusade. (Aplt.App.V4 at 1071) The only source of funds for the 1992 India crusade was Tilton's Church. (Aplt.S.Add. at S344) Harris and Dayanandhan took turns taking up the offering at the crusade. They told the crowd that all the crusade expenses were paid by Tilton's Church and the offering would go to help local pastors in India. (Aplt.App.V7 at 1931; V8 at 2082-85, 2087; Aplt.S.Add. at S345-46) Defendants do not dispute Dayanandhan's testimony that the money collected was for the local Indian pastors. (Aplt.S.Add. at S159) Neither Tilton nor the Church received any funds from the crusade. (Aplt.App.V2 at 379; V4 at 1071) Dayanandhan and Cosgrove testified that Tilton was never on stage when the offering was taken. (Aplt.App.V8 at 2080, 2086) J.N. Sharma, an ABC operative in India, and a cameraman attended and videotaped the crusade. (Aplt.App.V1 at 306) Sharma sent Gordon "raw footage" of the crusade with a "dope sheet" showing the sequence of shots. (Aplt.App.V7 at 1953-58) The dope sheet, video tape log and raw footage show there was an interval of time between Harris asking for donations and Tilton's arrival at the crusade. That raw footage does not show Tilton preaching when the offering was taken. (Id. at 1955-56; Aplt.App.V7 at 1959-76; Aplt.T.Add. T28-29) ABC's raw footage proves that ABC edited their film to show Tilton taking up an offering. (Aplt.T.Add. T28-29) What viewers "saw" never happened. (Id.)

Proof of actual malice. Gordon knew Tilton did not receive money from foreign crusades because Moore told Gordon on August 26, 1995, in the hidden camera interview:

> Tilton does a lot of missionary work, sends a lot of money overseas ... he doesn't raise money for missions, he just does it. He's real opposed to people raising money for missions and not doing it ... Overseas is strictly outgo ... there's no income. (Aplt.App.V7 at 1804-1805)

Gordon gave Sharma specific details and instructions. (Aplt.App.V1 at 306; V2 at 367) Gordon expressed to Sharma great interest "in knowing if they ever take up a collection of money during the service ... If so, please be sure and get that on tape." (Aplt.App.V7 at 1977-79) Gordon had "raw footage" and the dope sheet. (Aplt.App.V7 at 1953)

In an April 6, 1992 memo, Sutherland follows up a discussion with Sharma: "We are hoping you are able to locate 1) observers or followers who are angry or upset that money was collected ... ." (Aplt.App.V7 at 1980) In her June 9th memo to Sawyer and Rosen, Gordon details her plan for the India segment of PT II: Tilton claims the India crusade was "all charity", but PrimeTime learned it is not as "Tilton passes the collection plates, taking donations from [the poor]," "We saw crippled people ... giving him their money. How much did he collect? ... he stood to make a half million dollars." (emphasis added) (Aplt.App.V7 at 1916) Gordon knew that ABC did not have any raw footage showing any person, crippled or not, giving Tilton any money. (Aplt.T.Add. T28) Sutherland's June 18 and 22, 1992, memos show they were still pushing Sharma for evidence of Gordon's "Tilton passes the collection plate":

> We would also like to know what happened to the money after it was collected. Was it given to local churches? Was is [sic] somehow funneled back to the Indian people? or did Tilton take the money and run?
>
> What did Tilton's people say when they collected the money? What did they say would happen to the money? Can you document what did happen to the money?? (emphasis added) (Aplt.App.V7 at 1981-82)

Sharma was there when Harris asked the crowd to donate money, yet his affidavit is silent as to what Harris said or what happened to the money. (Aplt.App.V2 at 322) Sharma does not state that Tilton asked for or collected money, but carefully states, "during the time that these collections were being taken up I also saw that Robert Tilton ... was present on stage." (Aplt.App.V2 at 321) ABC has no raw footage to place Tilton on stage when an offering was taken, but intentionally edited its raw footage to show that which never happened. (Aplt.App.V2 at 317; V3 at 682; Aplt.S.Add. at S159; Aplt.T.Add. T28-T29) When you create a lie by fraudulently editing your own raw footage, you know it is a lie.

Proof that viewers understood gist as asserted by Plaintiff. Connie Cohn, who also appeared in the update on PT II, said: "As I watched Prime Time showing Tilton collecting money in India from some of the poorest people on earth, I knew I had made the right decision to go on the air with my experiences." (Aplt.App.V5 at 1225)

## SUMMARY OF ARGUMENT

The Dist. Ct. erroneously granted Defendants' motions for summary judgment as to all Tilton's claims. Tilton presented sufficient evidence from which a jury might find that he has shown

falsity, and actual malice by clear and convincing evidence. On *de novo* review this Court can determine that the statements at issue are capable of the defamatory meanings asserted by Tilton and were so understood by the viewers, are false and were made by Defendants with actual malice. The affidavit of Dr. Lashner presented relevant expert testimony that should have been considered on summary judgment as it would assist the jury at trial. Oklahoma's newman's privilege does not apply to a libel action by a public figure when the newsman asserting the privilege is a named defendant. Finally, this Court should recognize that Tilton is entitled to prove the falsity of the challenged statements in the broadcasts and then to enjoin their rebroadcast.

## ARGUMENT AND AUTHORITIES

### I. The Dist. Ct. erred in granting summary judgment.

A. Standard of Review on summary judgments is *de novo*. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate only if "there is no genuine issue of material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of material fact is genuine if a "reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Credibility determinations, weighing of evidence and drawing legitimate inferences from the facts are not permitted. Id. at 255, Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1557 (10th Cir. 1995). The evidence must be viewed and any inferences drawn in a light most favorable to the party opposing. Anderson, 477 U.S. at 249-52. The movant must "foreclose the possibility" that a jury might find actual malice. Id. at 249. Summary judgment is not appropriate unless it is clear that a trial is unnecessary. Id., at 255, Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, 36 (10th Cir. 1975)("The movant must demonstrate entitlement beyond a

reasonable doubt and if an inference can be deduced from the facts whereby the nonmovant might recover, summary judgment is inappropriate.")(emphasis added).

As an admitted public figure, in order to recover at trial, Tilton is required to show with "convincing clarity"[7] that each alleged libelous statement "was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). However on summary judgment where actual malice is an issue, the Supreme Court stated in Anderson:

> [T]he appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

and emphasized:

> We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. 477 U.S. at 255-58.(emphasis added)

As to issues on which this nonmovant bears the burden of proof at trial, actual malice and falsity, the movant may obtain summary judgment only if movant can establish that under no circumstance could the jury find for the nonmovant, from the evidence which was before the Court with due regard for the

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[7] That standard is not applied to judge each individual piece of evidence, rather "[p]laintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden has been met. Tavoulareas v. Piro, 817 F.2d 762, 794 n.43 (D.C.Cir. 1987), cert. denied, 484 U.S. 870 (1987).

required instruction that actual malice must be proven by clear and convincing evidence. Thus, as stated by the Supreme Court in Anderson, all that is required for this movant to defeat summary judgment is the presentation of proof based upon which the jury might or could return a plaintiff's verdict. Anderson, 477 U.S. at 255.

Applying the criteria utilized in Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) the Dist. Ct. could not have granted summary judgment in favor of any of the Defendants. Tilton did not have the benefit of the credibility of his evidence as forecast assumed, nor his version of disputed facts accepted as true, internal conflicts resolved in his favor, the most favorable of all alternative inferences construed in his behalf, nor was he given the benefit of all favorable legal theories invoked by the evidence as considered. All inferences to be drawn from underlying facts should have been viewed in the light most favorable to Tilton. Tilton received no such treatment here. Instead, the Dist. Ct. elected to adopt Defendants' positions despite the obvious controversies surrounding genuine issues of material fact.[8] The Dist. Ct. not only believed Defendants' testimony on disputed facts, the Dist. Ct. also accepted as libels, matters not asserted as libels, but asserted as being the statements of the broadcasts by the Defendants.

**B. Plaintiff presented sufficient evidence from which a jury might/could return a verdict in his favor.**

In a libel case, a court must first decide whether a statement is capable of the defamatory meaning the Plaintiff ascribes to it. Norse v. Henry Holt and Co., 991 F.2d 563, 567 (9th Cir. 1993),

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[8] "The danger involved in ruling on a motion for summary judgment is the temptation to treat the extra-pleading materials as all the evidence that could possibly be produced in a given case and to make subconscious judgments on the quality of proof instead of simply determining whether a factual issue exists." Keating v. BBDO Intern., Inc., 438 F.Supp. 676, 680 (S.D.N.Y. 1977).

Tatum v. Phillip Morris Inc., 809 F.Supp. 1452, 1470 (W.D. Okla. 1992), aff'd, 16 F.3d 417 (1993), cert. denied, 114 S.Ct. 1833 (1994).

> [I]f a defamation claim is based on allegations of *implied* defamatory facts, the court must make a threshold preliminary determination whether the published statements could be understood as implying the alleged defamatory content. If the statements are susceptible of both an innocent and libelous meaning, it is for the jury to decide how they were in fact understood. Weller v. Am. Broadcasting Companies, Inc., 232 Cal.App.3d 991, 1001 n.8, 283 Cal. Rptr. 644, 650 n.8 (Cal.App. 1991).

The statement is to be interpreted from the standpoint of the average reader or viewer, "judging the statement not in isolation, but within the context in which it is made." Norse, 991 F.2d at 567, citing Restatement (Second) of Torts §563 cmt. d (1977). If a statement is capable of defamatory and non-defamatory meanings or if there is a question of what an article says, the determination of the meaning or "sting" is a question for the jury. Schiavone Const. Co. v. Time, Inc., 847 F.2d 1069, 1084 (3rd Cir. 1988), Restatement, § 614(2). Here the Dist. Ct. disregarded the libels as asserted by Tilton and Tilton's proof that the libels were thus understood and made no attempt to determine if the broadcasts were capable of the meanings asserted by Tilton.

Dist. Ct. recognized "it is the substance, the gist or the sting" of the alleged defamatory statements that are critical to the Court's analysis." Masson v. New Yorker Magazine, 501 U.S. 496, 517 (1991) (Aplt.App.V3 at 841-42) The "substance, the gist, the sting" of the statements at issue is what they mean to the viewer, not what is literally stated or what the Defendants say they meant. Norse,

supra. Determining the meaning of statements on TV requires more than examining a printed transcripts:

> [T]elevision broadcasts add new and potentially significant variables to the defamation analysis. *See Lasky v. American Broadcasting Companies, Inc.*, 631 F.Supp. 962, 970 (S.D.N.Y. 1986). Courts must scrutinize the juxtaposition of the audio and video portions of a television program. In subtle ways, a television director can alter the tone of an otherwise innocuous broadcast. With the emerging popularity of self-styled "magazine" news programs, courts should be sensitive to the possibility that a transcript which appears relatively mild on its face may actually be, when the total max of creative ingredients are considered, highly toxic. Indeed, a clever amalgamation of half-truths and opinion-like statements, adorned with orchestrated images and dramatic audio accompaniment, can be devastating when packaged in the powerful television medium. Corporate Training Unlimited v. Nat'l Broadcasting Co., Inc., 868 F.Supp. 501, 507 (E.D.N.Y. 1994)(emphasis added).[9]

The Dist. Ct. should have determined "the substance, the gist, or the sting" of each of Tilton's "libels," by considering if the

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[9] See, White v. Fraternal Order of Police, 909 F.2d 512, 526 (D.C.Circ. 1990)("Television touches more senses than does the print media, and the standards for finding defamation cannot be woodenly applied without taking into account the kind of medium by which the message was delivered."), Southern Air Transport, Inc. v. Am. Broadcasting Companies, Inc., 877 F.2d 1010, 1015 (D.C. Cir. 1989)("[I]t is the juxtaposition of the audio and visual elements that conveys the meaning intended"), Silvester v. Am. Broadcasting Companies, Inc., 650 F.Supp 766, 770 (S.D. Fla. 1986), aff'd, 839 F.2d 1491 (11th Cir. 1988)(evaluating a TV broadcast requires considering words and pictures together).

statement taken as a whole in context of the entire broadcast as presented both visually and auditorially, could be defamatory. The Dist. Ct. did exactly the opposite. The fundamental flaw in the Dist. Ct.'s analysis of Plaintiff's libels lies in the fact that it examined each statement in isolation and ignored context. As Justice Holmes explained, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918)(citation omitted). In essence, the Dist. Ct. adopted the Defendants' point of view as to what each of the statements "said," ignoring the central issue - whether an average view could infer the meaning asserted by Plaintiff. This case is unique in that there was substantial evidence before the Dist. Ct. proving what the average viewer inferred. (Aplt.App.V5 at 1378-1405; V6 at 1406-1692; Aplt.T.Add. T16-T17)

Defendants' attack on Tilton is presented on a "news" program reporting the results of a four-month investigation:

> [T]he publication of implied defamatory statements against the background of apparently objective and neutral reporting is almost certain to be understood as factual. Moreover, the implied defamatory facts in this context may be given even more credence by the listener where, as here, the reports profess to be objective, yet subtly imply that the publisher tends to believe the sources alleging the defamatory facts. Weller, 232 Cal.App.3d at 1004, 283 Cal. Rptr. at 652.

Watch Sawyer's dramatic ability - it is fully utilized to convey her righteous contempt to emphasize the implied wrongdoing and must be considered in determining if defamatory meaning is conveyed. White, 909 F.2d. at 526.

Determination of falsity depends in large part on the "sting" of the broadcast statements. Schiavone, 847 F.2d at 1084. "[A] defense, aimed at establishing the truth of a charge different from that made in the publication, cannot stand." Crane v. New York World Telegram Corp., 126 N.E.2d 753, 759 (N.Y. 1955). Justice Brennan in his dissent in Milkovich v. Lorain Journal Co., 497 U.S. 1, 23-24 (1990) agrees with the majority "that the statement that plaintiff must prove false under Hepps is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said."

"Reckless disregard" is shown by presenting "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" yet published. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). See Herbert v. Lando, 441 U.S. 160 (1979). Cumulative circumstantial evidence "is often the only way to prove malice in libel cases." Perk v. Reader's Digest Ass'n, Inc., 931 F.2d 408, 411 (6th Cir. 1991), citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989). It is well established that a "jury may infer from the totality of the defendant's conduct toward a plaintiff 'a predetermined and preconceived plan to malign [plaintiff's] character' and cause him injury which is, of course, a functional definition of actual malice." Falwell v. Flynt, 797 F.2d 1270, 1277 (4th Cir. 1986), rev'd on other grounds sub nom. Hustler Magazine v. Falwell, 485 U.S. 46 (1988), quoting Goldwater v. Ginsburg, 414 F.2d 324 (2nd Cir. 1969), cert. denied, 396 U.S. 1049 (1970). Defendants' strategy is apparent throughout the broadcasts. Tilton was the target. (Aplt.App.V5 at 1392) Defendants used every trick they had including four fraudulent edits to paint the worst scenario possible and "have fun" with Tilton - even when they had found "no fraud" on him. (Aplt.App.V5 at 1227) This is evident in Gordon's August 27th memo, outlining her scheme with Tilton the highlight of the

show, using him as a tease at the beginning to grab viewer's attention, following with Grant and Lea who were "more obvious in their fraud (and more sloppy)" and getting the viewers "angry at the fraud these guys get away with" (Aplt.App.V5 at 1234).[10] Gordon wrote the story and then created "facts" to support what she wrote. The worst example is Gordon wrote on August 27th before anyone went through the Bank's trash that the Bank "discard[s] the little mailback stuff (like the dirt Tilton is supposed to pray over)," then Defendants' agents stole prayer requests, planted them and had Anthony "find" them to support that lie. Id. at 1240. Defendants teased viewers with numerous spots about Tilton before they ever presented Tilton's segment. (Aplt.T.Add. T1-T2) As planned, Defendants laid out the broadcast so, by the time Tilton's segment ran, viewers would be infuriated with Grant's Haitian orphanage scam and Lea's giving only small change to the Polish church he used to rake in tens of thousands and attribute the same outrages to Tilton.

Defendants' preconceived story line and misleading editing of quotations is enough to raise a genuine issue as to actual malice. Goldwater, 414 F.2d at 336-337. To follow a preconceived story line despite evidence to the contrary is circumstantial evidence of state of mind. McHale v. Lake Charles Am. Press, 390 So.2d 556, 563 (3d Cir. 1980), cert. denied, 452 U.S. 941 (1981). Intentional deletion of exculpatory material is evidence from which a reasonable jury could find actual malice by clear and convincing evidence. Schiavone, 847 F.2d at 1073. As early as the Moore interview on

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[10] These critics concurred: "The case made against Tilton is the most devastating of all, and it is made finally in stunning visual terms having to do with a trash bin behind Tilton's bank," "the one that will make his followers the angriest is saved for last.... [bank deposits the money and throws away the rest]," and "It is Tilton who emerges as the most insidious and powerful in the *PrimeTime* report." (Aplt.App.V5 at 1398, 1391, 1392)

August 26th, Gordon was going to show Tilton was really getting his "Holy Water" from Taiwan but recognized she didn't have the evidence: "I really wanted to get [Moore] to say that stuff is not from the River Jordan." (Aplt.App.V7 at 1779) But she only needed "to look at [the] wordings better" to discover that with a little creative scripting and editing she could use Moore's "We get stuff from Taiwan" to "mak[e] it clear to people that there are ways that-- ... it's not that a minister is going to do everything that he says he going to do." (Aplt.App.V7 at 1817, 1822; V4 at 1138) Despite no evidence that the Holy Water came from Taiwan and despite Moore's comments supporting Tilton's honesty, Gordon, Sutherland and Sawyer worked to get Bruegger to say Tilton's religious activities were a fraud using the Holy Water from Taiwan ploy. (Aplt.App.V7 at 1763-64, 1841-56, 1871-73; V8 at 1983-87; Aplt.T.Add. T12) Defendants' stuck to Gordon's pre-conceived story line even in PT II. Defendants' use of the phrase "that holy place" with "Taiwan" was hardly accidental - without that phrase linking "Taiwan" with "Holy Water from the River Jordan," the implication would not have been so clear. The intentional use of Moore's comment, "We get stuff from Taiwan" to confirm the desired implication so that he seems to say more than in fact was said certainly raises a triable issue of actual malice. Westmoreland v. CBS, Inc., 596 F.Supp. 1170, 1174 (S.D.N.Y. 1984). Defendants had no evidence of fraud, but they had "fun" with this libel. Defendants' argument that the broadcasts "never said the water came from Taiwan" (Aplt.App.V2 at 373) does not foreclose the possibility that a jury might find that was the implication Defendants intended and find actual malice. Anderson, 477 U.S. at 249. Defendants understood the implication that Tilton would be engaging in mail fraud if he lied about the origins of his Holy Water from their research and Sawyer's questioning of the Postal Service official. (Aplt.App.V7 at 1855, 1871-73; V8 at 1983-87, 1988-99; Aplt.T.Add. T19)

Preconceived story line was the "Missions-Haiti-Jones" story. Gordon never did expect to find that Tilton's missions were non-existant, but early on she planned to link Tilton to the temporary sign scenario in Grant's segment. (Aplt.App.V5 at 1258, 1237) Gordon, Sutherland and Cooke went to Haiti with the Church magazine "sign" pictures hoping to get Jones to talk about the temporary sign process and give them something they could use with Tilton's sign picture. And Jones did - "[h]e said exactly what it was." See p. 12-13, supra. A jury could find that this finalized, in Defendants' minds, a sure means of attaching Jones' illicit behavior to Tilton even though they knew there was no relationship between Tilton and Jones. (Aplt.App.V2 at 350) Defendants admit the Jones' reference during the Tilton segment was to raise the possibility that Tilton was making contributions in the same fraudulent manner as Grant, although they had no evidence or honest belief that ever happened. (Aplt.App.V1 at 282; V2 at 350) To raise the possibility of a commission of a crime without any proof of same proves actual malice. Fabrication of specific facts is probative not only of falsity but of actual malice. St. Amant, 390 U.S. at 732. Despite believing that Tilton supported a Haitian orphanage, Defendants presented a charade in asking the Haitian officials if it was registered when they knew it wasn't. Defendants knew or should have known how Sawyer's statement "So nothing from Robert Tilton here?" would be perceived.

The "back-lit man" cannot be considered "a competent and reliable source" as ABC asserted when he cannot and does not directly state that Tilton did "x" or "y" but only responds evasively and ambiguously: "he was there," "he was truly in tune with our emotions." (Aplt.App.V3 at 673; V7 at 1827-28) If the "back-lit man" "had made it clear to [Gordon] that Tilton had mocked preachers and had attended tent revivals ..." why is there no such unequivocal statement on his videotape interview? (Aplt.App.V2 at 354) Gordon certainly tried to elicit answers she could use.

(Aplt.App.V7 at 1823-40; Aplt.T.Add. T21) The nonresponsive tone of Taylor's evasive and ambiguous answers to Gordon's leading questions raise obvious doubts about his veracity and her actual malice. Harte-Hanks, 491 U.S. at 691.

Gordon's outline included the "back-lit man" segment as early as August 1991. (Aplt.App.V5 at 1234, 1238) Despite this, Tilton was not approached for questioning about the allegations until October.[11] (Aplt.App.V1 at 305) Harbison was known but never questioned. (Aplt.App.V2 at 355) From such facts, a jury could reasonably believe that Defendants were committed to running the story without regard to its truth or falsity. Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758, 772 (Ky. 1990), cert. denied, 498 U.S. 1047 (1991).

> In addition to inadequately investigating the truthfulness of [source's] accusation, [defendants'] construction in favor of the most potentially damaging alternative of the ambiguous statement made against [plaintiff], exaggerating the charge, "creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness." Id. at 773. (citations omitted)

Gordon's minimal efforts to verify the "back-lit man's" credibility, Defendants' awareness of the gravity of their charges and the potential harm to Tilton, their failure to investigate further after Tilton's denial is evidence of actual malice. Id. at 772. Gordon had reason to doubt the "back-lit man." See p. 17, supra. The jury can reasonably find that she intentionally altered what he said to present a false impression to the viewers of Tilton. A jury could find actual malice from Defendants' quotation of part of the "back-lit man's"

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[11] Tilton offered to view the broadcast and to inform the Defendants if there were any mistakes or errors contained in the broadcast. (Aplt.S.Add. at S125)

interview without quoting another part that qualified or contradicted the part quoted and the omission of contradictory material within the same sentence when quoting from that sentence. Goldwater, 414 F.2d. at 336-37.

Disputed fact issues for the jury are (a) was it ABC's idea to go through the trash and (b) was ABC present on the trash sweeps. Anthony testified it was ABC's idea to go through the trash. (Aplt.App.V8 at 2026-27, 2031) Gordon's first affidavit said it was Anthony's decision. (Aplt.App.V4 at 1111-12) After Defendants began paying for Anthony's attorney (Aplt.App.V8 at 2041A), he testified it was a simultaneous decision (Aplt.App.V8 at 2042) which agrees with Gordon's latest affidavit. (Aplt.App.V2 at 340) In November of 1992, Anthony testified Gordon and Cooke were at night trash sweeps. (Aplt.App.V5 at 1306-1332) Gordon does not deny she was on trash sweeps; she just says ABC told her to keep away from the actual trash sites. (Aplt.App.V2 at 340) Her expense report for October 11, 1991, noted: "Ole assisted us in Tulsa in ... trash runs." (emphasis added) (Aplt.App.V5 at 1333) Cooke testified he did not go to trash dumpsters at night. (Aplt.App.V8 at 2074) Anthony testified that most of the trash sweeps were at night and that Gordon and Cooke, as a photographer (Aplt.App.V5 at 1309), were present on four days (evening of one day into the morning hours of the next day constituting two days). (Aplt.App.V8 at 2043-45) He also believed ABC employees actually dug through the trash with him. (Aplt.App.V5 at 1309-10) If the jury believes Anthony's first statement (closest in time), when he had no reason to lie, that it was Defendants' decision to go through the trash, and determines that Gordon and Cooke were present on the trash sweeps, the jury can use that as circumstantial evidence to arrive at their conclusion that ABC planted the documents and destroyed the photographs taken by Cooke (especially in light of the deliberate changing of testimony to show accord by Anthony and Gordon and the conflicting testimony

between Cooke and Anthony). These are crucial fact issues which can only be determined by the jury. If Defendants did not steal the documents and plant them in the trash, why the perjured and deceptive testimony on this matter?

Defendants' rebroadcast months later presented a unique situation - they had time to find out and knew how PT I was perceived, to research and to correct any wrong impressions. Their republication of essentially the same information as to Tilton, in the face of sworn testimony and documentary evidence disproving their original statements, clearly demonstrates Defendants' actual malice. Defendants were put on notice several times that their allegations regarding the Holy Water, Haiti-Missions and Prayer Requests were false. ABC's investigation, if any, following Tilton's challenges between broadcasts would have to be considered "grossly inadequate in the circumstances." Hunt v. Liberty Lobby, 720 F.2d 631, 645 (11th Cir. 1983). Defendants disregarded the information furnished them. Defendants cannot now assert that their "purposeful avoidance of the truth" does not provide clear and convincing evidence of their actual malice. Harte-Hanks, 491 U.S. at 692, Masson, 960 F.2d 896, 900 (9th Cir. 1992).

Defendants assert "ABC did not accuse Tilton of any criminal activity in connection with the Beebe loan" by including statements that Beebe was linked to organized crime. (Aplt.S.App. at S48) Why include Beebe in the Tilton segment if it wasn't their blatant attempt to accuse Tilton of connected with organized crime. If that isn't what they intended to convey, then Beebe served no purpose in the broadcast.

The Dist. Ct. found "the challenged statements ... did [not] ... explicitly accuse Plaintiff of mail fraud." (emphasis added) (Aplt.App.V3 at 855) It is the Dist. Ct.'s responsibility in a libel case to make the threshold determination as to whether or not the viewing audience would understand the libel asserted by Plaintiff.

Defendants in this case are world class wordsmiths. They know exactly what they say, exactly what they mean and exactly how every word that they utter will be understood by viewers. Defendants asked governmental officials specific questions concerning mail fraud, used the mail fraud statute as a visual on the broadcasts, and then bragged in PT II: "Our original report triggered investigations by the FBI, the IRS, the Postal Service and the Texas attorney general's office." (Aplt.App.V4 at 1173)

The libels asserted by Tilton are what the viewers understood. To say that these wordsmiths did not intend that implication because they said they didn't, is just to write libel laws out of existence. Clearly, Defendants who set out to destroy an innocent person with lies, framing, theft, false editing and perjured testimony, could not be expected to admit to their wrongdoings. Bose Corp. v. Consumers Union of United States, 692 F.2d 189, 196 (1st Cir. 1982), aff'd, 466 U.S. 485 (1983). In this case, there is not just one instance of fraudulent edits; four separate instances are: (1) Defendants changed Taylor's "I" statement to a "we" statement to include Tilton; (2) Defendants used a clip of Tilton saying "No" in his Morales deposition to present Tilton as a liar; (3) Defendants used another clip from Tilton's Morales deposition to misrepresent that Tilton claimed his contribution provided 100% of the Guatemalan mission's needs; (4) Defendants cut and spliced, not once but three times, their raw footage from India to make what they showed on TV support the lie that Sawyer uttered, "Well, there was Tilton, passing the collecting plates nightly." Using Tilton's words makes Defendant's portrait of Tilton especially damming. Masson, 501 U.S. at 517-518. These edits are lies and they know they are lies since they created them. Fraudulent edits are akin to the altered quotations determined to be actionable in Masson. These edits caused a material change in meaning and are probative of actual

malice. Id., 501 U.S. at 517. Fraudulent edits created to support Defendants' fraudulent statements prove actual malice.

Sawyer's statement, "Well, there was Tilton, passing the collection plates nightly," purports to be a direct account of events that speak for themselves. Defendants knew that their videotapes didn't show that and that Sharma's statement only puts Tilton on the stage (not passing a collection plate or even asking for money) and that "fact" (Tilton on stage) is refuted by the testimony of Tilton, Cosgrove and Dayanandhan (disputed fact - a jury question). Since Defendants knew what they had, knew the meaning of the language employed and knew the edited clip did not accurately reflect the information they had, they had to know that Sawyer's statement was inaccurate and false at the time they wrote and broadcast it. That is evidence of actual malice. Bose, 466 U.S. at 512, Time, Inc. v. Pape, 401 U.S. 236, 285 (1971). Defendants may not escape liability for this defamatory segment since they knowingly took words and pictures out of context and used them to convey a false representation of fact - to mislead the viewer. Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977).

The Dist. Ct. repeated what Defendants claimed were the gists of the broadcasts and rendered its judgment thereon. Defendants' gists are not relevant - only those libels asserted by the Plaintiff are before the Court. The libels and gist of the libels asserted by Tilton were specifically set forth on exhibits submitted to the Dist. Ct. and, again, handed to the court during the summary judgment oral argument and Plaintiff's counsel informed the court that those would be the contentions in the pretrial order. (Aplt.App.V2 at 615-636; V3 at 685; V8 at 2000-2010)

Defendants rarely quote. The false implications they broadcast are the product of their own creation. The body of law predicated upon reliance on information received has no application to the fact situation at bar where Defendants themselves created the

fraudulent statements libeling Tilton. It is axiomatic that when you create a lie, you know that it is a lie. The facts presented above, under each of the libels presented above, clearly establish that Defendants knew what they were doing when they created the false statements and that they deliberately created those false statements. Because they did not have any evidence of any wrongdoing by Tilton, the subject of their vicious attack, they had great "fun with him" by creating scenarios that implied he had done that which they could not prove he had done. They then with straight face come before the Court and say we knew that he had an orphanage in Haiti; we knew that he didn't get Holy Water from Taiwan; we didn't accuse him of mail fraud, if we had wanted to accuse Tilton of mail fraud, we could have. (Aplt.S.Add. at S178) The fact is that they had absolutely nothing that they could present from a negative standpoint on this minister other than what they call his extravagant lifestyle, which is not asserted as libel - you can't libel a prosperity minister by stating that he is prosperous. All of the facts set forth above and contained in the exhibits are adopted and incorporated in the argument. This being *de novo* review it is totally driven by the facts before this Court, it is unnecessary to further argue what will be blatantly apparent to the Court upon examination of the evidence offered to this Court. The issue before this Court on *de novo* review is whether or not Tilton presented sufficient evidence to establish that a jury could/might render a verdict in his favor on the specific libels he alleged. Tilton has done that.

### C. Capital Cities is liable to Tilton for its role in the production and airing of the broadcasts.

The Dist. Ct. erred in granting Capital Cities' motion for summary judgment. Tilton's exhibits proved that Capital Cities did more than conceptually endorse the broadcasts -- Capital Cities was actively consulted on a regular basis, financially backed the broadcasts, provided credit cards to Gordon and Sawyer, reimbursed

expenses of those involved with the broadcasts and even provided financial incentives to some of those same individuals. (Aplt.App.V2 at 451-593) The Dist. Ct. found that Gordon was an employee of ABC. (Aplt.App.V3 at 828) Gordon testified she was employed by "Capital Cities/ABC." (Aplt.App.V8 at 2090). Capital Cities had actual knowledge of the falsity of those portions of the PrimeTime broadcast addressed by the documents it received from the Morales case. (Aplt.App.V6 at 1704-07) Capital Cities tacitly admitted that its department provided legal advice to its subsidiaries. (Aplt.App.V3 at 759). On July 8, 1992, that same legal department provided legal advice concerning the second broadcast to Stephen Weiswasser, Senior Vice President of Capital Cities/ABC, Inc. (Aplt.App.V2 at 586, 589) The evidence before the Dist. Ct. established that Capital Cities' role in the production and airing of the broadcasts was more than simply "financial backing." At the very least, the evidence demonstrated the existence of a disputed issue of material fact regarding Capital Cities' role in the broadcasts which was sufficient to withstand summary judgment.

### D. Injunctive relief is available to prevent republication of statements judicially determined to be false.

Tilton seeks no prior restraint but only to enjoin the rebroadcast of those statements specifically set out in his Complaint upon proving them to be false in this action. (Aplt.App.V1 at 52, 82-83, 85) The Sixth Circuit, citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel., 413 U.S. 376, 390 (1973), granted a permanent injunction against statements judicially determined to be false and libelous. Lothscheutz v. Carpenter, 898 F.2d 1200, 1208-1209 (6th Cir. 1990). The Third Circuit, while reversing the grant of a permanent injunction because of state common law concerns, recognized:

> The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected. ... Because libelous speech is not protected by either the United States or the Pennsylvania Constitutions, it follows that, once a jury has determined that a certain statement is libelous, it is not a prior restraint for the court to enjoin the defendant from repeating that statement. Kramer v. Thompson, 97 F.2d 666, 675-76 (3d Cir. 1991)(citations omitted)

A "calculated falsehood" is unprotected by the First Amendment. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) Where there is a prior adjudication of falsity, any repetition by a defendant is publication of a "calculated falsehood." Tilton's injunction claim stands alone. Tilton has the right to prove a statement is false and enjoin the republication of that false statement without regard to whether or not Tilton can prove actual malice as to the first publication. False speech is not protected by the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

**E. There is no newsman's privilege applicable here.**

The Dist. Ct. denied Tilton's motions seeking the identity of Defendants' confidential sources on the basis that Tilton had not complied with subsection B.2 (establish by clear and convincing evidence that such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternate means) of Okla. Stat. tit. 12 § 2506. (Aplt.App.V1 at 259; V3 at 816-17, 906) Subsection B provides a newsman's privilege but states in an unnumbered paragraph:

> This subsection does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the defendant asserts a defense based on the content or source of the information.

Id. Defendants assert as a defense that Tilton cannot prove actual malice. To be able to prove what Defendants knew, Tilton is entitled to know all that Defendants knew. Defendants cannot be heard to complain that Tilton cannot prove actual malice and at the same time, try to hide between the newsman's privilege. That would write the libel laws out of the Oklahoma statutes, an intent clearly not demonstrated by this statute. Tilton believes that some of these shielded confidential sources are the ones who stole documents from the Bank, IDM and the Church. Their information is extremely relevant. Those witnesses that could assist Tilton to prove actual malice against Defendants could, under the Defendants' and the Dist. Ct.'s interpretation of that statute, be shielded from discovery. Tilton did not ask Defendants to libel him; when they elected to do so, they forfeited the protection of the Oklahoma statute.[12]; (Aplt.App.V1 at 1-24, 87-98, 686-688.

## II. The Dist. Ct. erred in denying Plaintiff's use of his expert linguist for summary judgment and trial purposes.

Standard of Review. A trial judge has broad discretion in the admission or exclusion of expert evidence, and his action is to be sustained unless *manifestly erroneous.*" Specht v. Jensen, 853 F.2d 805, 810 (10th Cir. 1988), cert. denied, 488 U.S. 1008 (1989)(citation omitted). At the Dist. Ct.'s request, Tilton submitted

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[12] The United States Supreme Court refuses to find the First Amendment provides additional protection (evidentiary privilege) to media defendants beyond the requirement of actual malice. Univ. of Pennsylvania v. E.E.O.C., 493 U.S.182 (1990), Herbert v. Lando, supra, Branzburg v. Hayes, 408 U.S. 665 (1972). See Aplt.App.V1 at 1-24.

his expert linguist's report and authority supporting her admissibility. (Aplt.App.V1 at 99-209) The Dist. Ct. found that Dr. Lashner's testimony should be excluded from trial because:

> [it] relates to matters within the common knowledge of an average juror. ... [It] would not assist the jurors in reaching a determination as to whether Plaintiff was defamed or placed in a false light by the PrimeTime Live broadcasts.... [I]n regard to ... actual malice ... it would not assist the jury in ... determining what Defendants' subjective state of mind was in making the subject broadcasts ... [her] testimony should be excluded under Rule 403 ... on the basis that the testimony would be confusing to the jury, would be a waste of time and would be unfairly prejudice [sic] to Defendants. (citations omitted). (Aplt.App.V3 at 834-36)

Finding Plaintiff's expert linguist's testimony inadmissible, the Dist. Ct. granted Defendants' motion to strike Dr. Lashner's affidavit. (Aplt.App.V3 at 836)

Judge Weinstein found the exclusion of expert testimony, because the subject is within the average juror's comprehension, to be incompatible with the standard of helpfulness expressed in Fed. R. Evid. 702 and with the Federal Rules' emphasis on liberalizing expert testimony. 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02] at 702-15, 702-30 (1982). See Aplt.App.V1 at 100, 107-110. Such ready exclusion of expert testimony that can assist a jury is also inconsistent with the broadened acceptance in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993). See In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 741-747 (3rd Circ. 1994). Dr. Lashner's testimony can assist the jury in identifying the evidentiary basis of the implicit meaning they, like the average viewer, would perceive. Weller, 232 Cal.App.3d at 1008, 286

Cal.Rptr. at 654-655. If the Dist. Ct. had considered Dr. Lashner's report, it would not have granted summary judgment. (Aplt.App.V1 at 116-209; V3 at 774-784)

"The exclusion of relevant evidence under Rule 403 is 'an extraordinary remedy to be used sparingly."[13] K-B Trucking Co. v. Riss Intern. Corp., 763 F.2d 1148, 1155 (10th Cir. 1985)(citations omitted). As Tilton has explained, Dr. Lashner's testimony will not confuse but clarify and will not waste but save time. (Aplt.App.V1 at 104, 114; V3 at 777) The probative value of her testimony is not substantially outweighed by the danger of unfair prejudice to Defendants. Defendants are expert journalists fully capable of explaining what the broadcasts "said." The Dist. Ct.'s decision denying Tilton use of an expert linguist is manifestly erroneous as it denies Tilton the right to a level playing field. Defendants do not want their victims to have the benefit of a person schooled as they are schooled, because if they can convince the trier of fact, as they did the Dist. Ct. here, that the words only say what Defendants say, then they walk away the winner and society as a whole is the loser.

## CONCLUSION

Summary judgment granted in favor of Defendants Capital Cities, ABC, Sawyer, Gordon and Sutherland should be reversed and the case remanded for trial with injunctive relief available upon proof of falsity. Dist. Ct.'s order excluding testimony of Tilton's expert linguist should be reversed. Dist. Ct.'s order prohibiting Tilton from discovering the identity of Defendants' confidential sources should be reversed and appropriate discovery should be directed.

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[13] Where testimony is excluded under Fed. R. Evid. 403, "the usual approach on the question of admissibility on appeal is ... to give the evidence its maximum reasonable probative force and its minimum prejudicial value." Weinstein ¶ 403[03] at 403-25 to 403-26.

## REQUEST FOR ORAL ARGUMENT

Oral argument, in this case, will be of substantial benefit to the Court in considering the numerous exhibits and the inter-relationships of those exhibits, one to another.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 1995, a true and correct copy of the above and foregoing document was sent *via* Federal Express to the following attorneys for Defendants:

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Supreme Court, U.S.
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No. 96-817

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT G. TILTON,

*Petitioner,*

—v.—

CAPITAL CITIES/ABC, INC., AMERICAN BROADCASTING COMPANIES, INC., ABC NEWS, INC., DIANE SAWYER, ROBBIE GORDON and KELLY SUTHERLAND,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court erred in granting summary judgment in favor of defendant journalists and against a public figure plaintiff where the plaintiff failed to present evidence sufficient to raise a genuine issue of material fact as to whether defendants broadcast false statements and/or whether defendants broadcast the statements with actual malice.

2. Where all of plaintiff's underlying libel and false light invasion of privacy claims were properly dismissed, whether the district court erred in applying the rule of Oklahoma law that equity will not enjoin a libel to dismiss plaintiff's claim for an injunction against false speech.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties to the appeal in the United States Court of Appeals for the Tenth Circuit that is the subject of the petition appear in the caption of this case.

Pursuant to Rule 29.6, the corporate respondents state as follows:

On September 19, 1996, respondent Capital Cities/ABC, Inc. was renamed ABC, Inc. ABC, Inc. is a wholly-owned subsidiary of Disney Enterprises, Inc., which is itself a wholly-owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC, Inc. has no nonwholly-owned subsidiaries except the following (all of which are nonwholly-owned indirect subsidiaries of ABC, Inc.): DSC Videos, Inc.; ESPN, Inc.; New York Farm Show, Inc.; Worldwide Television News Corporation; ABC/EA Home Software, Inc.; and ABC Radio Partners International Limited.

Respondent ABC News, Inc. is a wholly-owned subsidiary of ABC News Holding Company Inc., which is itself a wholly-owned subsidiary of ABC Holding Company Inc., which is itself a wholly-owned subsidiary of ABC, Inc. ABC News, Inc. has no nonwholly-owned subsidiaries.

Respondent American Broadcasting Companies, Inc. is a wholly-owned subsidiary of ABC Holding Company Inc., which is itself a wholly-owned subsidiary of ABC, Inc. American Broadcasting Companies Inc. has no nonwholly-owned subsidiaries.

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*Respondents*.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

Respondents respectfully submit that a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on August 27, 1996 should not issue because petitioner presents no question worthy of the exercise of this Court's *certiorari* jurisdiction and because the decision below is in all respects correct.

## STATEMENT OF THE CASE

### Statement of Facts

Through the 1980s and into the 1990s, petitioner Robert G. Tilton ("Tilton") became one of the most popular and

successful televangelists in the country. Both his daily television program and his weekly Sunday service were broadcast to a nationwide audience. In overwhelming numbers, viewers (often of limited means and in dire financial straits) responded by sending Tilton their prayers, their pledges and their contributions.

Notwithstanding his prominence and the media scrutiny accorded some other televangelists, Tilton and his ministry prospered without attracting much attention by the national press and media. In late 1990, however, respondent Diane Sawyer, the co-anchor and correspondent of respondent American Broadcasting Companies, Inc.'s ("ABC") television news program *PrimeTime Live* ("*PrimeTime*"), viewed some of Tilton's television broadcasts, was particularly struck by his repeated requests for money and began to consider Tilton as a possible subject for a news report.

Beginning in the spring of 1991, Sawyer and other investigative journalists working for *PrimeTime*, including respondents Robbie Gordon and Kelly Sutherland, began an extensive investigation of Tilton and a number of other prominent American televangelists. During that investigation, the ABC journalists contacted more than 200 potential sources. They interviewed, in the United States and abroad, present and former members and employees of Tilton's church, government officials, former friends of Tilton, business associates of Tilton, foreign missionaries and government officials, other journalists who had investigated Tilton and experts on televangelism. Tilton himself refused to be interviewed for the report.

In the course of the research, the ABC journalists met and received the assistance of a Dallas minister, Ole Anthony. Accompanied by Anthony, the journalists conducted a hidden camera interview at a direct mail company that did work for Tilton. The ABC journalists also attended services conducted by Tilton and obtained church mailings by placing their names on his mailing list.

During their investigation, the journalists learned that mail sent to Tilton in Dallas by his followers (usually containing contributions and prayer requests for Tilton's personal attention) in fact was immediately forwarded unopened to a bank in Tulsa, where all the money was removed. Subsequently, Mr. Anthony and his associates made three visits to the bank and another company in Tulsa that was part of Tilton's mail processing operation to inspect the trash at these sites. Anthony reported finding thousands of items that Tilton's followers had sent to him in Dallas to pray over but had ended up in the trash in Tulsa instead. The ABC journalists inspected what Anthony had found, confirming for themselves that the items had been "trashed."

ABC's months of investigation culminated in an hour-long report split into three segments which aired on November 21, 1991. One segment of the report was devoted to Tilton and his church. The segment revealed the sophisticated operation by which Tilton assured that contributions from followers were carefully processed and banked. The report contrasted the quite different treatment accorded the prayer requests sent to Tilton—including the fact that prayer requests had been found in the trash.

The report also revealed, for the first time to a national audience, Tilton's own lavish lifestyle—including his multi-million dollar homes, his generous salary, his $132,000 boat. The report also examined (to the extent it could be discovered without Tilton's cooperation), Tilton's background and the circumstances surrounding his rise to prominence as a televangelist.

ABC continued its investigation of Tilton after the broadcast. On July 9, 1992, the original program was rebroadcast, with certain minor changes, together with a follow-up report.

**The Proceedings Below**

In November of 1992, Tilton instituted this libel action in the United States District Court for the Northern District of Oklahoma.

In May of 1993, Tilton moved before the district court for entry of a temporary restraining order and a preliminary injunction barring ABC from rebroadcasting certain statements contained in the *PrimeTime* broadcasts. After a five-day evidentiary hearing, the district court denied Tilton's motion, finding, *inter alia*, that he had failed to "demonstrate[ ] that there [was] a substantial likelihood of recovery on the merits regarding the three claimed libels" because Tilton's evidence did not prove falsity or actual malice by clear and convincing evidence as required by this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. *Tilton* v. *Capital Cities/ABC, Inc.*, 827 F. Supp. 674, 681 (N.D. Okla. 1993).

After the close of discovery which included the taking of more than 70 days of depositions and the exchange of literally hundreds of thousands of documents, on March 28, 1995 respondents filed motions for summary judgment. Shortly after respondents filed their motions for summary judgment, Tilton filed his own motion claiming that there were no material issues of fact in dispute as to six core passages of the broadcasts and that he was entitled to summary judgment as to them.

On June 19, 1995, the district court issued its ruling granting summary judgment to the respondents. *Tilton* v. *Capital Cities/ABC, Inc.*, 905 F. Supp. 1514 (N.D. Okla. 1995) (Pet. App. at A4-A65).[1] In its exhaustive opinion, the district court examined the statements challenged by Tilton, painstakingly reviewed the submissions of the parties and properly applied the standards established by this Court for evaluating summary judgment motions in public figure libel cases. Judgment in favor of the respondents was entered. (Pet. App. at A2-A3)

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[1] References herein to "Pet. at ___" are to the Petition for a Writ of Certiorari. References herein to "Pet. App. at ___" are to the Appendix annexed thereto.

Tilton appealed to the United States Court of Appeals for the Tenth Circuit. The court of appeals heard oral argument on May 14, 1996. On August 27, 1996, the court of appeals affirmed the judgment of the district court in an opinion adopting the district court's analysis. *Tilton* v. *Capital Cities/ ABC, Inc.*, 95 F.3d 32 (10th Cir. 1996) (Pet. App. at A66-A68). On October 7, 1996, the court of appeals denied Tilton's petition for rehearing and suggestion for rehearing in banc, no member of the court having requested that a vote on rehearing be taken. (Pet. App. at A69-A70)

## SUMMARY OF ARGUMENT

In this action, the public figure petitioner asserted a libel claim against respondent journalists. Under well-established and repeatedly reaffirmed precedent of this Court, petitioner bore the burden of proving that the statements he challenged as libelous were false and of proving, by clear and convincing evidence, that respondents made the statements with actual malice.

After extensive discovery, both petitioner and respondents filed summary judgment motions. The district court carefully reviewed the record and properly applied Fed. R. Civ. P. 56 and the precedents of this Court. The district court rightly found that there existed no genuine issue of material fact to be tried and that petitioner could not satisfy his burden of proving falsity and/or actual malice. Accordingly, the court granted respondents' summary judgment motion. Applying Oklahoma law, the court also dismissed petitioner's claim for an injunction.

In his petition, Tilton merely contends that the district court should not have granted respondents' summary judgment motion. Yet Tilton fails to demonstrate any error by the district court and fails to identify any genuine issue of material fact that he contends should have been tried. In any event, the petition identifies no conflict with any decision of this Court or with any ruling of any court of another circuit and sets

forth no important question of federal law that should be decided by this Court. *See* Supreme Court Rule 10. Simply put, the petition presents no justification for exercise of this Court's *certiorari* jurisdiction.

## REASONS FOR DENYING THE WRIT

### I.

### TILTON WAS NOT DEPRIVED OF HIS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL BECAUSE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT TO BE TRIED AND SUMMARY JUDGMENT WAS THEREFORE PROPER

Tilton's first argument attempting to justify issuance of a writ of *certiorari* is that the district court's grant of summary judgment denied him his right to a jury trial under the Seventh Amendment to the United States Constitution. (Pet. at 6-13) As to this argument, as is also true with *all* others asserted in his petition, he cites no contrary ruling from any other court of appeals. Nor does he begin to demonstrate why this Court should review a ruling that is, at one and the same time, so fact-bound and so plainly correct.

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

*See generally Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-24 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986).

Tilton cannot seriously contend that Fed. R. Civ. P. 56 is unconstitutional under the Seventh Amendment. This Court has upheld the propriety of summary judgment procedures as not violative of Seventh Amendment jury trial rights. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968); *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 320 (1902); *cf. Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979) ("many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment," citing summary judgment as an example); *Galloway* v. *United States*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."); *In re Peterson*, 253 U.S. 300, 310 (1920) ("No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined."). Moreover, the Court has explicitly recognized the important role of summary judgment in protecting the rights of defendants to have baseless claims dismissed before a jury trial. *See Celotex*, 477 U.S. at 327.

The crux of Tilton's petition is instead the more routine argument that the district court misapplied Rule 56 in granting respondents summary judgment. But as the district court's opinion makes clear (and the court of appeals tacitly recognized by adopting and affirming the district court's opinion (95 F.3d at 33, Pet. App. at A67)), the district court carefully and properly applied Fed. R. Civ. P. 56 and the mandate established by this Court in *Anderson*, 477 U.S. 242, and *Celotex*, 477 U.S. 317. In any event, petitioner's challenge to the application of well-settled law to the facts of this case is hardly a basis for the issuance of a writ of *certiorari*. *See* Supreme Court Rule 10 ("A petition for a writ of *certiorari* is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

As required by *Celotex*, respondents

> "[bore] the initial responsibility of informing the district court of the basis for [their] motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which [they] believe[ ] demonstrate the absence of a genuine issue of material fact."

477 U.S. at 323. Respondents' motion was supported by detailed affidavits from each of the journalists principally responsible for the reports, transcripts of testimony (including the deposition and preliminary injunction hearing testimony of Tilton) and interrogatory answers of Tilton. Respondents' motion urged that based upon the undisputed material facts, no reasonable jury could conclude that the statements challenged by Tilton were false, *see Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776-78 (1986); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), and/or that the respondents broadcast the reports knowing that they were false or with reckless disregard of truth or falsity, *see New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).[2]

As the party opposing respondents' motion, Tilton was required to "come forward with 'specific facts showing that there is a *genuine issue for trial*.' " *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis in *Matsushita*). Here, Tilton himself moved for partial summary judgment with respect to six of the statements at issue, arguing that there was no genuine issue as to any material facts with respect to those statements.

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[2] Tilton was admittedly a public figure (Pet. App. at 81, 303), and accordingly does not dispute that under the precedents of this Court and of the Tenth Circuit, in order to prevail on his libel and false light claims he bore the burden of proving falsity and of proving actual malice by clear and convincing evidence.

As this Court instructed in *Celotex*:

> "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

*Celotex*, 477 U.S. at 322. Additionally, as the district court recognized (905 F. Supp. at 1520, Pet. App. at A8), under this Court's decision in *Anderson*, the court was required to consider Tilton's showing in light of the heavy burden placed on him by *New York Times* v. *Sullivan*, and its progeny. That is, because Tilton, as an admitted public figure, bore the burden of proving actual malice by clear and convincing evidence:

> "The appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

*Anderson*, 477 U.S. at 255-56.

The district court carefully considered the showings made by respondents and by Tilton. With respect to each of the statements at issue, the district court found either (1) that Tilton had come forward with no evidence upon which a reasonable jury could find the statement to be false or (2) that Tilton had come forward with no evidence upon which a reasonable jury could find, by clear and convincing evidence, that respondents made the statement with actual malice.

The district court properly applied the summary judgment standard of Rule 56, consistent with this Court's decisions in *Anderson* and *Celotex*, which are cited and discussed in the court's opinion. (905 F. Supp. at 1520, Pet. App. at A8)

Even now, in his petition for *certiorari*, Tilton remains unable to make the required "showing sufficient to establish the existence of an element essential to" his claims, that is,

falsity and/or actual malice. *See Celotex*, 477 U.S. at 322. Instead, Tilton argues, without citation, that the district court made credibility determinations, weighed the evidence, and made inferences, all against him. (Pet. at 8) He asserts that the district court "weighed the clearly disputed facts before it and unconstitutionally resolved them in favor of the moving party Defendants." (Pet. at 8)

Yet, notwithstanding this broad attack on the district court's analysis, Tilton fails to identify a single credibility determination or factual inference made against him by the district court. Nor can he, because the district court made none. Indeed, the district court explicitly recognized its obligation to draw all reasonable inferences from the record in Tilton's favor. (905 F. Supp. at 1519, Pet. App. at A8) Where respondents' credibility was put at issue by Tilton, the district court was careful not to make credibility determinations. *See, e.g.*, 905 F. Supp. at 1539, Pet. App. at A54 ("Even if [respondent] Ms. Sutherland's credibility were at issue and her testimony were discredited, Plaintiff has also not submitted affirmative evidence to satisfy his burden of proof in regard to the issue of actual malice."); 905 F. Supp. at 1536-37, Pet. App. at A48 ("even if [respondent] Ms. Gordon's testimony were discredited, Plaintiff has failed to present any affirmative evidence to show Defendants knew their statement . . . was false"). Tilton's petition fails to identify any "genuine issue as to any material fact" relevant to the bases upon which the district court dismissed Tilton's claims.

Tilton's petition makes only two attempts to specify any error by the courts below with respect to the grant of summary judgment. First, Tilton repeats the constant refrain he has made throughout this case—his contention that respondents stole prayer requests and planted them in the trash. Tilton again relies upon this allegation to support his claim of actual malice. (Pet. at 8)

Incredibly, Tilton asserts in his petition, without any citation at all to the record, that "[t]he undisputed facts conclusively establish that Defendants planted the prayer requests in

the bank dumpster in order to frame Pastor Tilton and to create a story to make money." (Pet. at 8) In fact, the record is devoid of any evidence whatsoever to support Tilton's wild theory. At oral argument of the motions for summary judgment, the district court directly challenged Tilton's counsel to state what, if any, evidence there was to support the oft-repeated claim of stolen prayer requests. Tilton's counsel was unable to identify any such evidence. In its decision, the district court correctly found:

> "Plaintiff also claims that the reports were false because the prayer requests were stolen and then planted in the trash dumpsters. Discovery, however, has failed to uncover any factual basis for the allegations that Defendants stole and planted the prayer requests in the trash dumpsters or in fact suspected that others stole and planted the prayer requests in the trash dumpsters." (905 F. Supp. at 1530-31, Pet. App. at A33)

In his appeal to the Tenth Circuit, Tilton was again unable to identify any factual basis whatsoever for his claim. (Pet. App. at A287-A293) Once again, in his petition to this Court, Tilton repeats his outrageous accusation, but is unable to cite even a scintilla of evidentiary support for the claim. In considering the sufficiency of Tilton's showing under Rule 56, the district court was not required to accept Tilton's implausible and utterly unsubstantiated allegation. *See Anderson*, 477 U.S. at 249 & 251; *Celotex*, 477 U.S. at 324; *Cities Service*, 391 U.S. at 288-90; Fed. R. Civ. P. 56(e).

Second, Tilton contends that the district court erred in dismissing his claims challenging *PrimeTime*'s report concerning Tilton's use of various items in his direct mail operation. Specifically, *PrimeTime* reported:

> "SAWYER: [voiceover] Tilton sends out an avalanche of things he asks viewers to send back to him—'miracle prayer cloths' he promises to touch and place upon an altar, cards he says he'll place upon a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing—place your hand there and he'll put his hand

> there too. There's holy water from the River Jordan, 'miracle anointing oil'—though Moore said some of these items come from that holy place, Taiwan.
>
> MOORE: 'We get stuff from Taiwan.' " (905 F. Supp. at 1523, Pet. App. at A16)

Tilton's principal claim with respect to this passage is that it accused him of committing mail fraud by sending viewers water from Taiwan and claiming it was from the River Jordan. (Pet. at 11-12) In dismissing Tilton's claim, the district court first noted that the *PrimeTime* report did not say what Tilton said it said—the report simply did not say that holy water in particular came from Taiwan nor that Tilton committed mail fraud. (905 F. Supp. at 1524, Pet. App. at A19) In any event, the district court carefully reviewed the record, including the hidden camera interview upon which the passage was based, and held that Tilton failed to show evidence that respondents made the statement with actual malice. (905 F. Supp. at 1524-25, Pet. App. at A19-A20)

After quoting the district court's ruling and its summary of his own argument, Tilton blithely contends "that the district court is going out of its way to accept the facts in a light most favorable to the moving party Defendants could not be more obvious." (Pet. at 11) Yet Tilton then cites to nothing in the record to suggest that respondents did act with actual malice. Instead, Tilton cites evidence he submitted to the district court intended to prove that he did not in fact obtain "holy water" from Taiwan. (Pet. at 12) But the district court did not dismiss Tilton's claim on the ground that the challenged statement was true—the court dismissed on the ground that Tilton made no showing that respondents acted with actual malice. Tilton's argument is thus irrelevant.

Tilton's final argument concerning the purported denial of his right to a jury trial amounts to the remarkable contention that a party can defeat a summary judgment motion merely by submitting sufficiently voluminous papers in opposition to the motion. Tilton explains that in the court below he submitted

2,243 pages and 174 exhibits intended to support his opposition to summary judgment. After erroneously asserting that *any* disputed fact identified by his submission should have precluded summary judgment,[3] Tilton concludes that "[c]onsidering the volume of factual information Pastor Tilton provided to both courts in support of his action, such a conclusion by the district court and the Tenth Circuit is not sustainable." (Pet. at 13)

Tilton attempted to overwhelm the courts below with a deluge of exhibits, a flurry of unsupported allegations and a barrage of irrelevant facts in the hope that sheer mass alone would persuade the courts that there must have been a genuine issue for trial. Yet Tilton was required, in response to the detailed and specific showing made by respondents, to come forward with "affirmative evidence" and "specific facts" to demonstrate that a reasonable jury could find (a) by clear and convincing evidence that respondents broadcast the statements challenged knowing that they were false or having serious doubts as to their truth and (b) that the challenged statements were false. *See Anderson*, 477 U.S. at 256-57. Despite the bulk of his papers, Tilton did not—indeed could not begin to—meet that burden. Summary judgment was properly granted by the district court and affirmed by the court of appeals.

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[3] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

## II.

## DISMISSAL OF TILTON'S CLAIM FOR AN INJUNCTION WAS PROPER UNDER OKLAHOMA LAW

### A. Tilton's Claim for an Injunction Was Properly Dismissed as a Matter of Oklahoma Law, Not Because It Sought a Prior Restraint

Tilton's petition also challenges the district court's dismissal of his "equitable claim for permanent injunction." In an attempt to elevate his argument to a constitutional level worthy of this Court's attention, Tilton contends that the district court dismissed the claim on the ground that it sought a prior restraint, thereby implicating the First Amendment. (Pet. at 13)

Tilton attacks a straw man. The district court dismissed Tilton's claim for an injunction as a matter of Oklahoma state law, not on the ground that it sought a prior restraint barred by the First Amendment. (905 F. Supp. at 1518 n.3, Pet. App. at A5 n.3)[4] Under Oklahoma law, as held by the Oklahoma Supreme Court in *Schmoldt* v. *Oakley*, 390 P.2d 882 (Okla. 1964), equity will not enjoin a libel or slander, subject to certain limited exceptions. *See also House of Sight & Sound, Inc.* v. *Faulkner*, 912 P.2d 357, 361 (Okla. Ct. App. 1995); *First American Bank & Trust Co.* v. *Sawyer*, 865 P.2d 347, 352 (Okla. Ct. App. 1993).[5] The district court held that Tilton's claim did not fall within any of those exceptions and the claim was therefore dismissed under Oklahoma law.[6]

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[4] Tilton did not dispute that Oklahoma law governed.

[5] To the extent that the Oklahoma Supreme Court's holding under Oklahoma law was bolstered by constitutional concerns, such concerns were explicitly based on the Oklahoma state constitution, not the First Amendment. *Schmoldt*, 390 P.2d at 886; *see also House of Sight & Sound*, 912 P.2d at 362; *First American Bank & Trust*, 865 P.2d at 352.

[6] To be sure, had the district court enjoined future *PrimeTime* or other ABC news broadcasts, as Tilton sought, it would have acted in

## B. Tilton Offers No Support for the "False Speech" Cause of Action He Asserts

Tilton contends that he should have been permitted to pursue a claim for injunctive relief against false speech, notwithstanding the dismissal of his underlying libel and false light claims based on his inability to satisfy his burden of proving actual malice and/or falsity. Not only is there no conflict in the circuits with regard to such a claim, but Tilton offers no authority whatsoever under Oklahoma law, or *any* other jurisdiction, upholding such a claim. Tilton's reliance on this Court's pronouncements in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942), that false statements of fact have slight or no constitutional value misses the point. As *Gertz* itself makes clear, this Court has squarely held that the Constitution requires, in an action brought by a public figure, that in the absence of actual malice false speech is constitutionally protected. *Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *see also New York Times* v. *Sullivan*, 376 U.S. at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . .") (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). Tilton's contention that "[o]bviously, the existence, or lack thereof, of actual malice is not an essential element in an attack upon libelous speech by its victims" (Pet. at 14) ignores his admitted public figure status and the decisions of this Court.

Tilton finally and inexplicably relies on the Third Circuit's decision in *Kramer* v. *Thompson*, 947 F.2d 666 (3d Cir. 1991),

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violation of the First Amendment. *See generally Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Near* v. *Minnesota*, 283 U.S. 697 (1931). But no such order was entered in this case.

a case that squarely refutes Tilton's argument. The plaintiff in *Kramer* was not permitted to pursue the "false speech" injunction claim Tilton asserts. Rather, the plaintiff asserted a libel claim, proved not only falsity but also actual malice, and prevailed on the merits of the claim. *Kramer*, 947 F.2d at 668, 679. Although the district court entered an injunction against future libels, the Third Circuit, applying Pennsylvania law, reversed that injunction. Consistent with Oklahoma law as found by the courts below here, the Third Circuit noted that "the maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law." 947 F.2d at 677. Contrary to Tilton's position, the Third Circuit opined that Pennsylvania law does *not* "permit an exception to the rule that equity will not enjoin a defamation in cases where there already has been a jury determination that the defendant's statements were libelous." 947 F.2d at 676.

Tilton's claim for an injunction was properly dismissed under Oklahoma law and is not deserving of this Court's review pursuant to its *certiorari* jurisdiction. *See* Supreme Court Rule 10.

## CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Dated: December 23, 1996

Respectfully submitted,

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